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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 207.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, APPELLANT,

vs.

JAMES K. KELLY, AARON E. WAIT, AND PHŒBE HUMASON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

**FILED APRIL 6, 1880.**

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1, 2 In the circuit court of the United States for the district of Oregon, term, 18 .

Be it remembered that on the 30th day of January, 1878, there was duly filed in the circuit court of the United States for the district of Oregon a transcript of record from the circuit court of the State of Oregon for the county of Wasco, in words and figures as follows, to wit:

3 *Complaint.*

In the circuit court of the State of Oregon for the county of Wasco. In equity.

JAMES K. KELLY, AARON E. WAIT, AND Phœbe M. Humason, plaintiffs,
*vs.*
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendants.

The plaintiffs above named complaining of the defendant, for cause of suit allege:

That they, the said plaintiffs, are residents of the State of Oregon, and the defendant is a duly organized corporation under the laws of the State of New York.

That Winsor D. Bigelow, a white male citizen of the United States, was born in the State of Massachusetts in the year 1823. That he arrived in the Territory of Oregon in the year 1849, and was a resident thereof (and of the State of Oregon) from the 27th day of September, 1850, until the 16th day of February, 1860. That on the 1st day of November, 1853, he was a white settler upon the public lands of the United States,

4 and on that day he personally commenced to reside upon and cultivate that part of the said public lands in the State of Oregon, designated in the surveys and plots of the United States as follows: Beginning at the NW. corner of the claim in section three (3), 48.92 chains west, and 4.83 chains south of the corner of fractional sections 2 and 3, in township one north, of range thirteen east of the Willamette meridian; thence south 36.50 chains; thence east 16.25 chains; thence south 49.47 chains; thence west 71.02 chains; thence north 32° 30′ east 101.82 chains to the place of beginning, containing three hundred and twenty acres. That the said Winsor D. Bigelow personally resided upon and cultivated the described *th*at of land continuously from the said 1st day of November, 1853, to the 16th day of February, 1860, and within three months after the survey was made by the United States of the said land, the said Bigelow notified the register and receiver of the proper land office of the precise tract of land claimed by him, described as hereinbefore set forth, and on that *on that* day proved to the satisfaction of the register and receiver by two witnesses, as well as by the oath of said settler, W. D. Bigelow, that he personally resided upon and cultivated said described tract of land continuously from the first day of November, 1853, to the 16th

5 day of February, 1860, and in all respects complied with the provisions of the act of Congress entitled "An act to create the office

of surveyor-general of the public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands," approved the 27th day of September, 1850, so as to entitle him to a donation of the said tract of land under and by virtue of the said act of Congress. And plaintiffs say that by virtue of the said settlement and cultivation and compliance with the terms of the said act of Congress, the said W. D. Bigelow became and was the owner of the said described tract of land.

And plaintiffs further say that afterwards, to wit, on the 19th day of December, 1862, the said W. D. Bigelow, by deed *only* executed and delivered, conveyed to the plaintiffs James K. Kelly and Aaron E. Wait, the undivided one-third part of the said described tract of land, excepting such lots and portions of the same as he had before that time sold and conveyed to other persons. That on the 12th day of December, 1864, the said W. D. Bigelow, by his deed *only* executed and delivered, conveyed to Orlando Humason the other undivided two-thirds of the said tract of land, excepting such lots and portions of the same as had been sold and conveyed by said Bigelow to other persons before that time. That afterwards,
6 to wit, on the 8th day of September, 1875, the said Orlando Humason died intestate, having before his death devised the said undivided two-thirds of said tract of land to the plaintiff Phœbe M. Humason. And plaintiffs say that they are now the owners, as tenants in common, of the said donation claim of W. D. Bigelow, except such portions thereof as have been sold and conveyed by the said W. D. Bigelow, or by the said plaintiffs to other persons. That they are now the owners, as tenants in common, of the following described piece or parcel of land, being a portion of said donation claim of W. D. Bigelow, to wit:

Beginning at the southeast corner of a tract of land containing 643.37 acres in sections 33 & 34, in T. 2 N., R. 13 E.; and in sections 3 & 4, in T. 1 N., R. 13 E. of the Willamette meridian, for which a patent was issued on the ninth day of July, 1875, by the United States of America to the Missionary Society of the Methodist Episcopal Church; thence west 33.75 chains to the eastern boundary of the military reservation; thence N. 32° 30′ E., along the last-named boundary or line, 5.50 chains, to the line of the military reservation as established by Major G. D. Raines; thence south 75° east 4.25 chains, to the southwest corner of the
7 said military reservation established by Major Raines; thence north 14° 23′ east, on the eastern boundary of the said military reservation, 10.50 chains to the north side of Webster street in the Bluff addition to The Dalles City; thence south, 66° east 25 chains to the east boundary of said tract patented on the 9th day of July, 1875, to the said Missionary Society of the Methodist Episcopal Church; thence south 5 chains to the place of beginning, containing twenty-seven acres, more or less (excepting blocks 28 and 29 in the said Bluff addition to Dalles City).

And the plaintiffs further say that the said last-described tract of land, containing twenty-seven acres, more or less, owned by them as aforesaid, is embraced within the boundaries of a certain tract of land containing 643.37 acres, which the defendant claims to own in fee simple, (except such portions as it has already sold), and for which a patent was issued by the United States to the defendant on the 9th day of July, 1875, and which is more particularly described as follows:

Beginning at the NE. corner of the claim in section 3, T. 1 N., R. 13 E., and on the left bank of the Columbia River at a set post; thence
8 south 63.27 chains to a set post in section 3, for the SE. corner; thence W. 80.00 chains to a set post in section 4, for the SW. corner; thence north 87.00 chains to a set post in section 33, T. 2 N., R. 13 E., for the NW. corner; thence east 45.19 chains to set post on the left bank of the Columbia River in section 34; thence with the meanders of the river, up stream S. 47° E. 14.58 chains; thence S. 38° E. 4.00 chains; thence S. 70° E. 8.78 chains; thence S. 76½° E. 9.20 chains, to the place of beginning.

And plaintiffs further say that the defendant claims to own the said tract of land, including the said piece or parcel containing twenty-seven acres, more or less, under and by virtue of the second proviso of section one of the act of Congress entitled "An act to establish the territorial government of Oregon," approved the 14th day of August, 1848, which confirmed and established the title to the land, not exceeding six hundred and forty acres, then occupied as missionary stations among the Indian tribes in the Territory of Oregon, together with the improvements thereon, to the several religious societies to which said missionary stations respectively belonged. That the defendant claims to have established a missionary station on the said tract of land among the Indian tribes at that place, and occu-
9 pied the same as such missionary station on the 14th day of August, 1848, and for some years prior to that time; and that by virtue of such occupancy it was and is entitled to the said land, and for which it received a patent on the 9th day of July, 1875.

And plaintiff further says that about the year 1840 the said defendant established a missionary station on a portion of the said tract claimed by it, and occupied the same as a missionary station until about the month of September, 1847, and then abandoned and discontinued said occupancy, and never after that time occupied the said tract or any portion thereof as a missionary station. That such abandonment was made in pursuance of an order of the defendant to its missionaries in Oregon, directing them to discontinue missionary labors at certain of their stations east of the Cascade Mountains. And that there was no missionary station on the said tract, or any portion thereof, on or after the 14th day of August, 1848. Yet the said defendant, notwithstanding the same was not occupied as such missionary station after the month of September, 1847, and did not belong to it; afterwards, to wit, about the year 1854, caused the said tract of 643.37 acres of land to be surveyed, and made a claim of title to it, under
10 and by virtue of the provisions of the said act of Congress approved the 14th day of August, 1848. That afterwards, to wit, on the 30th day of March, 1854, the said missionary society, by its agent, Rev'd Thomas H. Pearne, filed a notification of its claim of title to the said tract of land with the surveyor-general of Oregon. That afterwards the Commissioner of the General Land Office authorized and empowered the surveyor-general of Oregon to hear and determine the conflict and controversy existing between the said W. D. Bigelow and the Missionary Society of the Methodist Episcopal Church, in pursuance of which authority the surveyor-general notified the said parties, W. D. Bigelow and the said missionary society, that on the 16th day of February, 1860, he would proceed to the hearing of the said controversy.

That from that day until some time in October of the same year, testimony was taken before said surveyor-general, by the said missionary society to support the validity of its title to the said tract of land, and by the said W. D. Bigelow in opposition to its validity.

That after hearing the proofs and allegations of both of said parties, the said surveyor-general, on the 2d day of February, 1861, decided that the said Missionary society of the Methodist Episcopal Church had no title whatever to the said tract of land, nor to any part of it.

11 That said missionary society appealed from the said decision of the surveyor-general to the Commissioner of the General Land Office, who, after hearing the argument of counsel for the said parties, in the month of February, 1863, affirmed the said decision of the surveyor-general of Oregon. That said missionary society again appealed from the decision of the Commissioner of the General Land Office to the Secretary of the Interior. That after remaining undecided for many years, the Secretary of the Interior, on the 15th day of March, 1875, decided that the said Missionary Society of the Methodist Episcopal Church was entitled to the land in controversy, and on the 9th day of July, 1875, caused a patent to be issued therefor to the said Missionary Society of the Methodist Episcopal Church.

And plaintiffs say that the said decision of the Secretary of the Interior was wrongful, unjust, and illegal, that it was made under a misapprehension and mistake, both of the facts and the law, in regard to the rights of the said W. D. Bigelow. That there was no evidence whatever before him showing or tending to prove that any portion of the said tract of land was occupied as a missionary station by the Missionary Society of the Methodist Episcopal Church, after the month of September, 1847; but,

12 on the contrary, all the evidence before the said Secretary showed that the said missionary station had been abandoned by said missionary society in the month of September, 1847, and without any intention of again being occupied as a missionary station by said missionary society.

And plaintiffs say that the said patent was issued to the said Missionary Society of the Methodist Episcopal Church in violation of the rights of the said W. D. Bigelow and of the plaintiffs in this suit.

And plaintiffs further say that the said defendant, the Missionary Society of the Methodist Episcopal Church, on the 14th day of August, 1848, occupied a tract of land as a missionary station near the town of Salem, in the Territory of Oregon, and claimed the title to the same, under the provisions of the said act of Congress approved August 14th, 1848, and received a patent from the United States for the said tract of land containing 97.39 acres, situate in section 23 and 26, in T. 7 S., R. 3 W., long before the 9th day of July, 1875, when the patent was issued for the land in controversy in this suit.

Wherefore plaintiffs pray that the court will adjudge and decree that they are the owners of the said piece or parcel of land described in

13 the complaint, containing twenty-seven acres, more or less. That the defendant holds the legal title to the same in trust for the plaintiffs, and that the said defendant be decreed to make, execute, and deliver to the plaintiffs a deed of conveyance of all their right, title, and interest

to said piece or parcel of land, and for such other relief as the plaintiffs may be entitled to.

JAMES K. KELLY,
*For Himself, and Solicitor for the other Plaintiffs.*

STATE OF OREGON,
*County of Multnomah, ss:*

I, James K. Kelly, one of the plaintiffs in the within entitled suit, being duly sworn according to law, do say that the foregoing complaint is true, as I verily believe.

JAMES K. KELLY.

Subscribed and sworn to before me this 29th day of August, A. D. 1877.

[NOTARIAL SEAL.] F. R. STRONG,
*Notary Public for Oregon.*

(Endorsed:) Filed September 7th, A. D. 1877. R. F. Gibons, clerk.

(Endorsed) Filed Jan. 30th, 1878. R. H. Lamson, clerk.

14 *Summons.*

In the circuit court of the State of Oregon for the county of Wasco.

JAMES K. KELLY, AARON E. WAIT, AND Phœbe M. Humason, pl'ffs,
*vs.*
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, def't.

To the Missionary Society of the Methodist Episcopal Church, defendant:

In the name of the State of Oregon, you are hereby required to appear and answer the complaint filed against you in the above-entitled suit on or before the 12th day of November, 1877, that day being the first day of the term of said court next following the publication of this summons for six weeks. If you fail to answer the said complaint, the plaintiffs will apply to the court for the relief prayed for therein, to wit, a decree declaring that they are the owners of a portion of a tract of land in Wasco County, Oregon, claimed by you under an act of Congress approved August 14th, 1848, as a missionary station.

This summons is published by order of the Hon. L. L. McArthur, judge of said court.

15 Dated September 7th, 1877.

JAMES K. KELLY,
*For Himself, and Att'y for the other Pl'ffs.*

STATE OF OREGON,
*County of Wasco, ss:*

I, James K. Kelly, being duly sworn, say, that on the 7th day of September, 1877, I put in the U. S. mail a copy of the complaint in the within entitled suit, certified by me to be a true copy; also a copy of the above

summons. That I directed the same to the defendant at "No. 805 Broadway, New York City, N. Y.," and that I fully paid the postage on the same at The Dalles p. o. and delivered the same to the postmaster.

JAMES K. KELLY.

Subscribed and sworn to before me this 7th day of September, A. D. 1877.

R. F. GIBONS, *Clerk.*

(Endorsed:) Filed September 7th, A. D. 1877. R. F. Gibons, clerk. Filed January 30th, 1878. R. H. Lamson, clerk.

16 *Order for publication.*

In the circuit court of the State of Oregon for the county of Wasco.

JAMES K. KELLY, AARON E. WAIT, AND Phœbe M. Humason
*vs.*
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church.

Based upon a proper application, duly made, it is hereby ordered that the summons herein be served upon the defendant by publication thereof once a week for six consecutive weeks in the Weekly Mountaineer, a newspaper published in The Dalles, Wasco Co., Oregon, and having a general circulation throughout the State. And it is further ordered that the pl'ffs cause to be forthwith deposited in the post-office at The Dalles a copy of the complaint and summons herein, carefully directed to the defendant, at the office thereof, in New York City, N. Y., postage fully prepaid. And it is further ordered that during the publication of the said summons in the newspaper aforesaid, the same be forwarded to the def't by mail, addressed to the office of def't, at New York City, N. Y., and fully prepaid.

Done and dated this 7th day of Sept., 1877.

L. L. McARTHUR, *Judge.*

(Endorsed:) Filed September 7th, A. D. 1877. R. F. Gibons, clerk. Filed January 30, 1878. R. H. Lamson, clerk.

17 *Petition.*

In the circuit court of the State of Oregon for the county of Wasco.

JAMES K. KELLY, AARON E. WAIT, AND Phœbe M. Humason, pl'ffs.
*vs.*
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, def't.

Petition for removal of cause to the United States circuit court for the district of Oregon.

To the circuit court of the State of Oregon for the county of Wasco:

I. The petition of the defendant shows that a suit has been brought against the petitioner in this court by the plaintiff above named.

II. That this suit is brought by the plaintiffs to quite their pretended title to certain lands described in the complaint filed herein, and of which the defendant is the owner in fee simple, claiming title by grant from the United States and holding a patent from the United States therefor.

III. That the value of the land in dispute exceeds the sum of five hundred dollars exclusive of costs, as appears by the complaint, to wit: Twenty-seven acres of land lying within the corporate limits of Dalles City, in Wasco County, and district of Oregon, and is of the
18 value of three thousand dollars.

IV. That the petitioner is a corporation created by the laws of the State of New York and doing business therein, and said corporation has not any agent within this State on whom process against it may be served according to the laws of this State, and that its principal office and place business is in the State of New York.

V. That the November term, A. D. 1877, of the circuit court of the State of Oregon for the county of Wasco, is the term of said court at which the above-entitled action could be first tried, and that there has been no trial thereof.

VI. That the petitioner hereby offers good and sufficient security for its entering, in the next circuit court of the United States for the district of Oregon, on the first day of its next session, a copy of the record in the above-entitled suit, and also for its thus appearing and entering special bail in the suit if special bail were originally requisite therein according to the law and practice of the United States and its courts.

Your petitioner therefore asks that the said cause may be removed for trial into the next circuit court of the United States for the district of Oregon, to be held at Portland, in said district, pursuant to the pro-
19 visions of the said statutes of the United States in such cases made and provided, and that this court do accept the surety offered by your petitioner as aforesaid, and do proceed no further in the said cause, and for such further or other order or relief in the premises as may be just.

J. C. CARTWRIGT,
*Agent & Att'y for the Defendant.*

STATE OF OREGON,
*County of Wasco, ss:*

I, J. C. Cartwright, being duly sworn, say I am agent and attorney for the defendant above named, the petitioner herein, and that the foregoing petition is true, as I verily believe. That the reason this affidavit is not made by the petitioner is that said petitioner is a corporation not within this county and is not capable of making the same, and that I make this affidavit as the agent and attorney of said petitioner.

J. C. CARTWRIGHT,

Subscribed and sworn to before me this 12th day of Nov., 1877.

R. F. GIBONS, *Clerk.*

(Endorsed:) Filed Nov. 12th, 1877, R. F. Gibons, clerk. Filed January 30, 1878. R. H. Lamson, clerk.

20 *Affidavit.*

In the circuit court of the State of Oregon for Wasco County.

JAMES K. KELLY, AARON E. WAIT, AND Phœbe M. Humason, pl'ffs,
*vs.*
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, def't.

STATE OF OREGON,
*County of Wasco, ss:*

I, James K. Kelly, one of the plaintiffs, being duly sworn, do say that personal service of the summons in this suit cannot be made upon the defendant, within the State of Oregon; and that said defendant, after due diligence, cannot be found within this State.

That this suit is brought against the said defendant for the recovery of certain real property, situate in Wasco County, State of Oregon, claimed by the said defendant; that a cause of suit exists against the said defendant, and it is a proper party to this suit.

I further say on oath that the defendant is a foreign corporation, having its office and place of business in the city and State of New York.

JAMES K. KELLY.

21 Subscribed and sworn to before me this 7th of Sept., 1877.

L. L. MCARTHUR, *Judge.*

(Endorsed:) Filed September 7th, A. D. 1877. R. F. Gibons, clerk. Filed January 30th, 1878. R. H. Lamson, clerk.

22 *Bond.*

In the circuit court of the State of Oregon for the county of Wasco.

JAMES K. KELLY, AARON E. WAIT, AND Phœbe M. Humason, plaintiff,
*vs.*
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendant.

Bond for removal of cause to the U. S. circuit court.

Know all men by these presents that we, William Helm and Joseph Beezley, of Wasco County, Oregon, are hereby held and firmly bound unto James K. Kelly, Aaron E. Wait, and Phœbe M. Humason, the plaintiffs above named, their executors, administrators, and assigns, in the sum of two hundred dollars, lawful money of the United States, to be paid to the said James K. Kelly, Aaron E. Wait, and Phœbe M. Humason, their executors, administrators, or assigns, for which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, and every of them forever, by these presents. Sealed with our seals and dated the 12th day of November, A. D. 1877.

Whereas the above-named James K. Kelly, Aaron E. Wait, and Phœbe

23 M. Humason, have commenced a suit in the circuit court of the State of Oregon for the county of Wasco, against the above-named defendant, The Missionary Society of the Methodist Episcopal Church, and that at the term of said court at which said suit could be first tried, and before the trial thereof, the said defendant has filed its petition for the removal of the cause into the next circuit court of the United States for the district of Oregon, to be held at Portland, in said district: Now therefore, the condition of the above obligation is such that if the said Missionary Society of the Methodist Espiscopal Church, the defendant in said suit, shall enter in said circuit court of the United States, on the first day of its next session, a copy of the record in the said suit, and shall also then and there appear and enter special bail in the cause, if special bail was originally requisite therein, according to the law and practice of the United States and its courts, and shall pay all costs that may be awarded by the said circuit court if the said court shall hold that said suit was wrongfully or improperly removed thereto, then these presents and obligations shall be void, or otherwise to remain in full force.

WM. HELM. [SEAL.]
JOSEPH BEEZLEY. [SEAL.]

In presence of—
J. C. CARTWRIGHT.
R. F. GIBONS.

24 STATE OF OREGON,
*County of Wasco, ss:*

I, Wm. Helm, being first duly sworn, say that I am neither a counsellor nor attorney at law, sheriff, clerk of any court, or other officer of any court, and I am a resident and householder within the State of Oregon, and I am worth four hundred dollars over and above all debts and liabilities and exclusive of property exempt from execution.

WM. HELM.

Subscribed and sworn to before me this 12th day of Nov., A. D. 1877.
R. F. GIBONS,
*County Clerk.*

STATE OF OREGON,
*County of Wasco, ss:*

I, Joseph L. Beezley, being first duly sworn, say that I am neither a counsellor nor attorney at law, sheriff, clerk of any court, or other officer of any court, and I am a resident and householder within the State of Oregon, and I am worth four hundred dollars over and above all debts and liabilities, and exclusive of property exempt from execution.

JOSEPH BEEZLEY.

Subscribed and sworn to before me this 12th day of Nov., A. D. 1877.
R. F. GIBONS,
*County Clerk.*

(Endorsed:) Filed Nov. 12th, 1877. R. F. Gibons, clerk. Filed January 30, 1878. R. H. Lamson, clerk.

25 *Demurrer.*

In the circuit court of the State of Oregon for the county of Wasco.

JAMES K. KELLY, AARON E. WAIT, AND Phœbe M. Humason, plaintiffs,
*vs.*
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendant.
} Demurrer.

Now comes the above-named defendant, The Missionary Society of the Methodist Episcopal Church, by its att'y, J. C. Cartwright, and demurs to the plaintiffs' complaint in the above-entitled suit, and for grounds of demurrer allege:

That said complaint does not state facts sufficient to constitute a cause of action.

J. C. CARTWRIGHT,
*Att'y for Defendant.*

(Endorsed:) Filed Nov. 12th, 1877. R. F. Gibons, clerk. Filed January 30, 1878. R. H. Lamson, clerk.

26 *Affidavit.*

In the circuit court of the State of Oregon for Wasco County.

JAMES K. KELLY, AARON E. WAIT, AND Phœbe M. Humason, pl'ffs,
*vs.*
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, def't.

STATE OF OREGON,
*County of Wasco, ss:*

I, Wm. M. Hand, being duly sworn according to law, do say that I am the printer of the Mountaineer, a weekly newspaper published at Dalles City, in the county of Wasco and State of Oregon; that the summons in the above-entitled cause, a copy of which is hereto annexed, was published in said newspaper with the order of the court for six consecutive weeks, commencing on the 8th day of September, 1877, and that during the publication of the said summons in said newspaper, a copy of said newspaper was forwarded by mail, addressed to the defendant, at its office, No. 805 Broadway, New York City, N. Y.

WILLIAM M. HAND.

27 Subscribed and sworn to before me this 13th day of Nov., 1877.

R. F. GIBONS, *Clerk.*

*Summons.*

In the circuit court of the State of Oregon for the county of Wasco.

JAMES K. KELLY, AARON E. WAIT, AND Phœbe M. Humason, plaintiffs,
*vs.*
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendant.

In the name of the State of Oregon, you are hereby required to appear and answer the complaint filed against you in the above-entitled suit on or before the 12th day of November, 1877, that being the first day of the term of said court next following the publication of this summons for six weeks. If you fail to answer the said complaint the plaintiff will apply to the court for the relief prayed for therein, to wit, a decree declaring that they are the owners of a portion of a tract of land in Wasco County, Oregon, claimed by you under an act of Congress approved August
28 14, 1848, as a missionary station.

This summons is published by order of Hon. L. L. McArthur, judge of said court.

Dated the 7th day of September, 1877.

JAMES K. KELLY,
*For Himself, and Attorney for the other Pl'ffs.*

(Endorsed:) Filed Nov. 13th, 1877. R. F. Gibons, clerk. Filed January 30, 1878. R. H. Lamson, clerk.

29 *Journal entry.*

At a regular term of the hon. the circuit court of the State of Oregon for the county of Wasco, begun and held at the court-house in Dalles City, on Monday, the 12th day of November, A. D. 1877, at ten o'clock a. m., at which were present the following officers, to wit: Hon. L. L. McArthur, judge; L. B. Ison, dist. att'y; J. B. Crossen, sheriff, and R. F. Gibons, clerk. And among other, the following proceeding was had on Tuesday, November 13th, A. D. 1877, the same being the second judicial day of said term, to wit:

JAMES K. KELLY, AARON E. WAIT, AND Phœbe M. Humason,
*vs.*
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church.

Now, on this day this cause comes on to be heard upon the defendant's petition for change of cause to the United States circuit court, the plaintiffs appearing by James K. Kelly, of counsel, and the defendant by
30 J. C. Cartwright, of counsel. The same was submitted without argument, and it appearing that the matters in dispute herein exceed, exclusive of costs, the sum of $500, and that said defendant is a corporation doing business in the State of New York, having its principal office in said State, and it further appearing that a good and sufficient bond in the sum of $200 has been filed herein, and after due consideration by the court it is ordered that said petition be granted, and that the place of trial

of this cause be changed to the United States circuit court to be holden at Portland, Oregon, at its next regular session; and it is further ordered that a transcript of the proceedings herein be forthwith transmitted to the clerk of said court.

(Signed) L. L. McARTHUR, *Judge.*

STATE OF OREGON,
*County of Wasco, ss:*

I, R. F. Gibons, county clerk in and for said Wasco County, and ex officio clerk of the circuit court of the State of Oregon for the county of Wasco, do hereby certify that I have compared the foregoing with the original entry in the journal of said court, and that it is a true and correct transcript therefrom and of the whole of such original, as the same
31 appears of record at my office and in my custody.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court this 28th day of January, A. D. 1878.

SEAL OF CIRCUIT COURT, WASCO COUNTY, STATE OF OREGON.

R. F. GIBONS, *Clerk.*

(Endorsed:) Filed January 30, 1878. R. H. Lamson, clerk.

32 *Order.*

And afterwards, to wit, on Monday, the 8th day of April, 1878, the same being the 1st judicial day of the regular April term of said court, present, the honorable Matthew P. Deady, United States district judge presiding, the following proceedings were had in this cause, to wit:

JAMES K. KELLY, AARON E. WAIT, AND Phobe M. Humason, *vs.* THE MISSIONARY SOCIETY OF THE M. E. Church. } No. 391. April 8, 1878.

Now, at this day comes the plaintiffs by Mr. James K. Kelly, and the defendant by Mr. Rufus Mallory and Mr. J. C. Cartwright, its attorneys, and on motion of said defendant it is ordered that said defendant have leave to amend its demurrer filed herein, and that said demurrur be set for hearing to-morrow, April 9th, 1878.

33 *Order.*

And afterwards, to wit, on Tuesday, the 9th day of April, 1878, the same being the 2nd judicial day of the regular April term of said court, present, the honorable Matthew P. Deady, United States district judge presiding, the following proceedings were had in said cause, to wit:

JAMES K. KELLY, AARON E. WAIT, AND Phœbe M. Humason, *vs.* THE MISSIONARY SOCIETY OF THE M. E. Church. } No. 391. April 9, 1878.

Now, at this day comes the plaintiffs by Messrs. James K. Kelly and

William Strong, their attorneys, and the defendant by Messrs. Rufus Mallory and John C. Cartwright, its attorneys, and this cause comes on to be heard upon the demurrer to the complaint herein, and is argued by counsel and taken under advisement by the court.

33½ And afterwards, to wit, on Wednesday the 17th day of April, 1878, the same being the 5th judicial day of the regular April term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said cause, to wit:

34 *Order.*

In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

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|---|---|
| JAMES K. KELLY, AARON E. WAIT, AND PHEBE M. HUMASON, *vs.* THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church. | No. 391. April 17th, 1878. |

Now, at this day comes the plaintiffs by Messrs. James K. Kelley and William Strong, and the defendant by Messrs. Rufus Mallory and John C. Cartwright, and the court having heard the argument of counsel on the demurrers to the complaint herein, and duly considered the same, it is ordered that said demurrers, both general and special, be, and the same are hereby, overruled, with leave to defendant to set up and insist upon the same matters in his answer on final hearing.

And the plaintiffs are hereby directed to restate their case in the form of a bill in equity, and to serve a copy thereof upon the defendant or its attorney within thirty days.

(Signed) DEADY, *J.*

(Endorsed:) Filed April 17th, 1878. R. H. Lamson, clerk.

34½ And afterwards, to wit, on the 2nd day of May, 1878, there was duly filed in said court a bill in equity in words and figures as follows, to wit:

35 *Bill in equity.*

In the circuit court of the United States for the district of Oregon.

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|---|---|
| JAMES K. KELLY, AARON E. WAIT, AND Phœbe M. Humason, complainants, *vs.* THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendants. | |

To the judges of the circuit court of the United States for the district of Oregon:

James K. Kelly, of the county of Multnomah, Aaron E. Wait, of the county of Clackamas, and Phœbe M. Humason, of the county of Multno-

mah, and all citizens of the State of Oregon, bring this their bill against The Missionary Society of the Methodist Episcopal Church, a duly organized corporation under the laws of New York, having its office or principal place of business in the city of New York, in that State.

And thereupon your orator' complain and say that Winsor D. Bigelow, a white male citizen of the United States, was born in the State of Massachusetts in the year 1823, and arrived in the Territory of Oregon in the year 1849; that he was a resident in the Territory and State of Ore-
36 gon from that time until the 16th day of February, 1860. That on the 1st day of November, 1853, he was a white male settler upon the public lands of the United States, and on that day he personally commenced to reside upon and cultivate that part of the said public lands in Oregon designated in the surveys and plats of the United States as follows: Beginning at the northwest corner of the claim in section 3, 48.92 chains west and 4.83 chains south of the corner of fractional sections 2 and 3, in township 1 north, of range 13 east of the Wallamette meridian; thence south 36.50 chains; thence east 16.25 chains; thence south 49.47 chains; thence west 71.02 chains; thence north 32° 30′ east 101.82 chains, to the place of beginning, containing three hundred and twenty acres. That the said W. D. Bigelow personally resided upon and cultivated the said described tract of land continuously from the said 1st day of November, 1853, to the 16th day of February, 1860, and during such residence he was a single man. That the survey was made by the United States of the said public lands, and such survey approved on the 4th day of February, 1860, and within three months thereafter, to wit, on the 16th day of February, 1860, the said W. D. Bigelow notified the register and receiver of the proper land office of the precise tract of land claimed by him, described as
37 hereinbefore set forth; and on that day proved to the satisfaction of the register and receiver by two disinterested witnesses, as well as by his own oath, that he personally resided upon and cultivated the said described tract of land continuously from the 1st day of November, 1853, to the 16th day of February, 1860, and in all respects complied with the provisions of the act of Congress entitled "An act to create the office of surveyor-general of Oregon, and to provide for the survey, and to make donations to settlers of the said public lands," approved September 27, 1850, so as to entitle him to a donation of the said tract of land under and by virtue of the said act of Congress; and that on account of a claim of title to a portion of the said described tract of land by The Missionary Society of the Methodist Episcopal Church, the defendant in this suit, the said register and receiver declined to give a certificate of such continued residence and cultivation until the controversy between the said claimants should be decided by the land department.

And your orators say that by virtue of such residence and cultivation and compliance with the terms of the said act of Congress, the said W. D. Bigelow became and was the owner of the said described tract of land.

38 And your orators further say that afterwards, to wit, on the 19th day of December, 1862, the said W. D. Bigelow, by deed duly executed and delivered, conveyed to your orators James K. Kelly and Aaron E. Wait the undivided one-third part of the said described tract of land (excepting such lots and portions of the same as he had before that time sold and conveyed to other persons).

That on the 12th day of December, 1864, the said W. D. Bigelow, by his deed duly executed and delivered, conveyed to Orlando Humason the other undivided two-thirds of the said tract of land (excepting such lots and portions of the same as had been sold and conveyed by the said Bigelow to other persons before that time.)

That afterwards, to wit, on the 8th day of September, 1875, the said Orlando Humason died testate, having before his death devised the said undivided two-thirds of said tract of land to your orator Phœbe M. Humason. And your orators say that they are now the owners, as tenants in common of the said donation claim of W. D. Bigelow, except such portions thereof as have been sold and conveyed by the said W. D. Bigelow, or by your orators; that they are now the owners as tenants in common of the following piece or parcel of land, being a portion of said donation claim of W. D. Bigelow, to wit:

39 Beginning at the southeast corner of a tract of land containing 643.37 acres, in sections 33 & 34, T. 2 N., R. 13 E., and in sections 3 & 4, in T. 1 N., R. 13 E. of the Willamette meridian, for which a patent was issued on the 9th day of July, 1875, by the United States to the Missionary Society of the Methodist Episcopal Church; thence west 33.75 chains to the eastern boundary of the Fort Dalles military reservation; thence N. 32° 30′ E., along the last named boundary line, 5.50 chains, to the line of the military reservation as established by Major G. I. Rains; thence south 75° east 4.25 chains, to the southeast corner of the said military reservation, as established by Major Raines; thence north 14° 23′ east on the eastern boundary of the said military reservation, 10.50 chains, to the north boundary of Webster street in what is known as the Bluff addition to Dalles City; thence S. 66° E. 25.00 chains, to the east boundary of said tract, patented on the 9th day of July, 1875, to the Missionery Society of the Methodist Episcopal Church; thence south 5.00 chains to the place of beginning, containing twenty-seven acres, more or less (excepting blocks 28 and 29 in said Bluff addition to Dalles City).

And your orators further say that the said last described tract of land, containing twenty-seven acres, more or less, owned by them as aforesaid, is embraced within the boundaries of a certain tract of land con-

40 taining 643.37 acres, which the defendant claims to own in fee simple (except such portions thereof as it may have already sold), and for which a patent was issued by the United States to the defendant on the 9th day of July, 1875, and which is more particularly described as follows:

Beginning at the northeast corner of the claim in sec. 3, T. 1 N., R. 13 E., and on the left bank of the Columbia River at a set post; thence south 63.27 chains to a set post in section 3 for the southeast corner; thence west 80.00 chains to a set post in section 4 for the southwest corner; thence north 87.00 chains to a set post in section 33, T. 2 N., R. 13 E., for the northwest corner; thence east 45.19 chains to a set post on the left bank of the Columbia River in section 34; thence, with the meanders of the river up stream, S. 47° E. 14.58 chains; thence S. 38° E. 4.00 chains; thence S. 70° E. 8.78 chains; thence S. 76½ E. 9.20 chains, to the place of beginning.

And your orators further say that the defendant claims to own the said tract of land, including the said piece or parcel containing twenty-seven

acres, more or less, under and by virtue of the second proviso of section one of the act of Congress entitled "An act to establish the territorial government of Oregon," approved August 14, 1848, which confirmed and established the title to the land, not exceeding six hundred and
41 forty acres, then occupied as a missionary station among the Indian tribes in the Territory of Oregon, together with the improvements thereon, to the several religious societies to which said missionary stations respectively belonged. That the defendant claims to have established a missionary station on the said tract of land among the Indians at that place, and occupied the same as such missionary station on the 14th day of August, 1848, and for some years prior to that time, and that by virtue of such occupancy it was and is entitled to the said land, and for which it received a patent on the 9th day of July, 1875.

And your orators further say that about the year 1840 the said defendant established a missionary station on a portion of the said tract claimed by it, and occupied the same as a missionary station until about the month of September, 1847, and then intentionally abandoned and discontinued such occupancy, and never after that time occupied the said tract or any portion thereof as a missionary station. That such abandonment was made in pursuance of an order of the defendant to its missionaries in Oregon directing them to discontinue missionary operations east of the Cascade Mountains. And your orators say that notwithstanding the said defendant had so abandoned and discontinued missionary labors in
42 September, 1847, and did not after that time occupy the said station, yet the said defendant, about the year 1854, caused the said tract of 643.37 acres of land to be surveyed and made a claim of title to it under the provisions of the said act of Congress approved August 14, 1848. That afterwards, to wit, on the 30th day of March, 1854, the said defendant, by Rev'd Thomas H. Pearne, its agent and attorney, filed a notification of its claim of title with the surveyor-general of Oregon. That afterwards the Commissioner of the General Land Office empowered the surveyor-general of Oregon to hear and determine the conflict and controversy existing between the said W. D. Bigelow and the defendant in regard to said land, in pursuance of which authority the said surveyor-general notified the said parties that on the 16th day of February, 1860, he would proceed to the hearing of the said controversy.

That from that time until October of the same year testimony was taken before him by the defendant to support the validity of its title to said tract of land, and by the said W. D. Bigelow in opposition to its validity; that after hearing the proofs and allegations of both of said parties the said surveyor-general, on the 2d day of February, 1861, decided that the said defendant had no title whatever to said tract of land, nor to any part of it; that said defendant appealed from said decision to the Com-
43 missioner of the General Land Office, who, after hearing the argument of counsel for both the said parties, in the month of February, 1863, affirmed the said decision of the surveyor-
1 general; that said defendant again appealed
2 from the decision of the Commissioner of the Interior;
3 that after remaining undecided for many years,
4 the Secretary of the Interior, on the 15th day of March,
5 1875, decided that the defendant was entitled to the

land in controversy, and on the 9th day of July, 1875, caused a patent to be issued therefor to the defendant.

(12th page, 8th line.) And your orators say that the said decision of the Secretary of the Interior was wrongful, unjust, and illegal, and that it was made under a misapprehension and mistake, both of the law and the facts, in regard to the rights of the said W. D. Bigelow and of your orators; that there was no evidence whatever before him showing, or tending to prove, that any portion of the said tract of 643.37 acres of land was occupied as a missionary station by the defendant after the month of September, 1847, but, on the contrary, all the evidence before said Secretary of the Interior showed that the said defendant had abandoned said missionary station in the month of Septemer, 1847, without any intention of again occupying the same as a

(13th page, 2nd line) missionary station. And your orators say that the said patent was issued to the said defendant in violation of the rights of the said Bigelow and of your orators.

(13th page, 7th line.) And your orators further say that the said defendant, the Missionary Society of the Methodist Episcopal Church, on the 14th day of August, 1848, occupied a tract of land as a missionary station near the town of Salem, in Oregon Territory; that on the 30th day of April, 1853, the said defendant, by Thomas H. Pearne, its agent and attorney, filed in the office of the register of the land office at Oregon City a notification of its claim to the said tract of land containing 97.39 acres, situate in sections 23 and 26, in T. 7 S., R. 3 W., and that it was entitled to the same under and by virtue of the provisions of the said act of Congress approved August 14, 1848; that afterwards the Commissioner of the General Land Office directed the surveyor-general of Oregon to determine the validity of said claim; and that said surveyor-general, in the year 1861, decided that the said defendant was so entitled under the said act of Congress approved August 14, 1848, to said tract of land containing 97.39 acres, which decision was afterwards affirmed by the Commissioner of the General Land Office, since which time the title of the said defendant to said tract of land has been acknowledged by the United States, and un-

(14th page, 5th line.) questioned by any one. And your orators deny the right of the said defendant to another tract of land under the said act of Congress approved August 14, 1848.

In consideration whereof and forasmuch as your orators are without adequate remedy, save in a court of equity, your orators pray that the said defendant (who has already appeared in this court) may be required to answer upon oath all and singular the matters and things hereinbefore set forth and complained of, and especially to answer and set forth:

1st. Whether the Missionary Society of the Methodist Episcopal Church did not some time prior to the month of September, 1847, through its

agents, direct its missionaries in Oregon to discontinue missionary operations at the Dalles?

2d. Whether it did not, through its agents, in or about the month of September, 1847, sell and dispose of its missionary station at the Dalles to Dr. Marcus Whitman?

3d. Whether it was on the 14th day of August, 1848, in the occupancy of the said tract of land, or any part thereof, as a missionary station?

And your orators pray that this honorable court, upon the final hearing of this cause, will adjudge and decree that they are the owners of the said piece or parcel of land described in this bill, containing twenty-seven acres, more or less; that the defendant holds the legal title to the same
46 in trust for your orators; and that the said defendant be decreed to make execute and deliver to your orators a deed of conveyance of all its right, title, and interest to said piece or parcel of land, and for such other relief as they may be entitled to in a court of equity.

JAMES K. KELLY,
*For Himself & Solicitor for A. Wait & Phœbe M. Humason.*

STATE OF OREGON,
*County of Multnomah:*

I, James C. Kelly, being duly sworn, do say that I am one of the complainants in the within bill, and that I believe the same to be true.

JAMES K. KELLY.

Subscribed and sworn to before me this 2d day of May, 1878.

R. H. LAMSON,
*Clerk and U. S. Commissioner.*

(Endorsed:) Filed May 2d, 1878. R. H. Lamson, clerk.

46½ And afterwards, to wit, on the 27th day of June, 1878, there was duly filed in said court a motion to strike out part of complainants' bill, in words and figures as follows, to wit:

47 *Motion.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY, AARON E. WAIT, & PHŒBE M. HUMASON, complainants,
*vs.*
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendant.

Motion to strike out part of complainants' bill.

Comes now the said defendant by its solicitors and moves the court to strike out of the said complainants' bill the following words, to wit: 1st. Beginning at the word "and" in the 8th line of the 12th page and extending to and including the word "station" in the 2d line of the 13th page, for the reason that the same is immaterial and irrelevant. 2nd. Strike out the following words for the same reason: Beginning at the word

"and" in the 7th line of the 13th page and extending to and including the word "one" on the 15th line of the 14th page. 3d. Strike out the following words for the same reason: Beginning at the word "and" in the 16th line of the 14th page and extending to and including the figures 1848 in the 19th line of the same page.

J. C. CARTWRIGHT,
RUFUS MALLORY,
*Solicitors for the Defendant.*

(Endorsed:) Filed June 27, 1878. R. H. Lamson, clerk.

47½ And afterwards, to wit, on Monday, the 8th day of June, 1878, the same being the 35th judicial day of the regular April term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said cause, to wit:

48 *Order.*

In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

JAMES K. KELLY, AARON E. WAIT, AND PHŒBE M. HUMASON *vs.* THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church. | No. 391. July 8th, 1878.

Now, at this day come the complainant by Mr. James K. Kelly, of counsel, and the defendant by Mr. Rufus Mallory, of counsel, and the motion filed herein to strike out parts of the amended bill being submitted without argument; it is ordered that said motion be, and the same is hereby denied with leave to defendant to file exceptions to said amended bill.

(Signed) DEADY, *J.*

(Endorsed:) Filed July 8th, 1878. R. H. Lamson, clerk.

48½ And afterwards, to wit, on the 9th day of July, 1878, there was duly filed in said court exceptions to part of complainants' bill in words and figures as follows, to wit:

49 *Exceptions.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY, AARON E. WAIT, & PHŒBE M. HUMASON, complainants, *vs.* THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendants.

Exceptions to parts of complainants' bill.

Now comes the said defendant and excepts to those parts of the com-

plainants' bill hereinafter specified upon the ground and for the reason that said parts of said bill and each and every of them are irrelevant and impertinant, to wit:

1st. All of that part of complainants' bill beginning with the word "and" in the 8th line of the 12th page and extending to and including the word "station" in the 2d line of the 13th page.

2nd. All that part of complainants' bill beginning at the word "and" in the 7th line of the 13th page and extending to and including the word "one" in the 15th line of the 14th page.

3rd. All that part of complainants' bill beginning at the word "and" in the 16th line of the 14th page and extending to and including the figures 1848 in the 19th line of the same page.

Defendant says that each and all of the said specified parts of
50 said complainants' bill are irrelevant and impertinant and are by it excepted to for that reason.

JOHN C. CARTWRIGHT,
RUFUS MALLORY,
*Solicitors for Defendant.*

(Endorsed:) Filed July 9, 1878. R. H. Lamson, clerk.

50½ And, afterwards, to wit, on Saturday, the 27th day of July, 1878, the same being the 42d judicial day of the regular April term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in this cause, to wit:

51 *Order.*

In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

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|---|---|
| JAMES K. KELLY, AARON E. WAITE, AND Phebe M. Humason *vs.* THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church. | No. 391. July 27th, 1878. |

Now, at this day, come the complainant, by Mr. James K. Kelly, of counsel, and the defendant by Mr. Rufus Mallory, of counsel, and this cause having been heretofore heard on the exceptions filed to the bill herein, and argued by counsel, and taken under advisement by the court, and now, at this day, the court being fully advised in the premises, it is ordered that said exceptions be and they are hereby disallowed, and that defendant have two weeks in which to answer the bill of complaint herein.

(Signed) DEADY, *J.*

(Endorsed:) Filed July 27th, 1878. R. H. Lamson, clerk.

51½ And afterwards, to wit, on the 12th day of August, 1878, there was duly filed in said court an answer in words and figures as follows, to wit:

52 *Answer.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY, AARON E. WAIT, & PHŒBE M. HUMASON, complainants,
*vs.*
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendant.

To the judges of the circuit court of the United States for the district of Oregon:

This defendant, now and at all times hereafter saving and reserving to itself all benefit and advantage of exceptions which can or may be taken to the many errors, uncertainties, and imperfections in said complainants' bill of complaint contained, for answer thereto, or unto so much thereof as this defendant is advised is or are material or necessary for it to answer, answering, says:

It has no knowledge as to whether Windsor D. Bigelow, named in complainant' bill, is a white male citizen of the United States, or whether he was born in the State of Massachu'tts in the year 1823, or whether he arrived in the Territory of Oregon in the year 1849, and so cannot
53 admit that the said allegations are true, but it does not deny the same, but defendant denies any knowledge or information sufficient to form a belief as to whether, on the 1st day of November, 1853, he was a settler upon the public lands of the United States, or whether on that day he commenced to reside upon and cultivate that part of the said public lands in Oregon designated in the surveys and plats of the United States which is described in complainants' bill, denies any knowledge or information sufficient to form a belief as to whether the said W. D. Bigelow personally resided upon and cultivated the said described tract of land continuously from the said 1st day of November, A. D. 1853, to the 16th day of February, 1860, or as to whether during such residence, if he did reside thereon, he was a single man.

Defendant admits that the survey was made by the United States of said public lands, and such survey was approved on the 4th day of February, 1860, but defendant does not admit and it does not deny that within three months after the said 4th day of February, 1860, the said W. D. Bigelow notified the register and receiver of the proper land office of the precise tract of land claimed by him and described as in complainants' bill set forth, and defendant will not admit nor deny that on the 16th day of February, 1860, he proved, to the satisfaction of the register and receiver by disinterested witness' as well as by his own oath, that he had
54 personally resided on and cultivated the said described tract of land continuously from the 1st day of November, 1853, to the 16th day of February, 1860, but defendant denies that the said W. D. Bigelow did in all respects comply with the provisions of the act of Congress referred to in complainants' bill, approved September 27th, 1850, so as to entitle him to a donation of said tract of land under and by virtue of said act of Congress.

And defendant denies any knowledge or information sufficient to form

a belief as to whether on account of a claim of title to a portion of said described tract of land by the Missionary Society of the Methodist Episcopal Church (this defendant), the said register and receiver declined to give a certificate of such continued residence and cultivation until the controversy between the said claimants should be decided by the land department.

And defendant denies that by virtue of such residence and cultivation, and compliance with the terms of said act of Congress, the said W. D. Bigelow became or was the owner of the said described tract of land.

And defendant denies that on the 19th day of December, 1862, or at any other time the said W. D. Bigelow conveyed to the complainants James K. Kelly and Aaron E. Wait the undivided one-third part
55 or any part of the said tract of land described in complainants' said bill (except such lots or portions thereof as he had before that time sold and conveyed to other persons.) And denies that on the 12th day of December, 1864, or at any other time, the said W. D. Bigelow conveyed to Orlando Humason the other undivided two-thirds or any interest whatever in the said tract of land (except such lots and portions of the said land as had been sold or conveyed by the said Bigelow to other persons before that time). Defendant admits that afterward and on the 8th day of September, 1875, the said Orlando Humason died testate, but as to whether before his death he devised the said undivided two-thirds of the said tract of land to the complainant Phœbe M. Humason, defendant denies any knowledge or information sufficient to form a belief.

Defendant denies that the said complainants are the owners, as tenants in common or otherwise, of the said pretended donation claim of the said W. D. Bigelow, and denies that they are the owners, as tenants in common or otherwise, of the tract of land described in said complainants' bill, and said to contain twenty-seven acres, more or less, excepting blocks 28 and 29 in the 'Bluff' addition to Dalles City, as in said bill stated.

Defendant admits that the said tract of twenty-seven acres of land described in complainants' bill is embraced within the boundaries of
56 a certain tract of land containing 643.37 acres, which the defendant claims to own and does own (except such portions thereof as it has already sold), and for which a patent was issued by the United States to defendant on the 9th day of July, 1875, and which is particularly described in the complainants' bill.

And defendant admits that it claims to own the said tract of land, including the said twenty-seven acres, under and by virtue of the second proviso of section one of the act of Congress entitled "An act to establish the territorial government of Oregon," approved August 14th, 1848.

And defendant admits that it claims to have established a missionary station on the said tract of land, occupied the same as such missionary station within the meaning of the said act of Congress approved August 14th, 1848, on the said 14th day of August, 1848, and for some years prior to that time, and by virtue of such occupancy it was and is entitled to the said land, and for which it received a patent, which was dated 9th day of July, 1875.

Defendant further says that prior to the year 1840, that is to say, about the year 1836, it established a missionary station upon the said tract and claimed the same for that purpose, and occupied the same for the various

purposes of said mission continuously until about the month of
57 September, 1847, but defendant denies that it then intentionally abandoned and discontinued such occupancy, and never after that time occupied the said tract of land or any portion thereof as a missionary station.

And defendant says that the said 643.37 acres of land were occupied as a missionary station by its agents and missionaries, and by others with its permission, from the time the same was first founded until long after the said 14th day of August, 1848, except during such portion of said time as a condition of Indian hostilities and war in that section of country made it unsafe, injudicious, and impracticable, as will hereafter appear.

Defendant denies that said alleged and pretended abandonment was made *was made in* in pursuant to an order made by itself to its missionaries in Oregon, directing them to discontinue missionary operations east of the Cascade Mountains.

Defendant denies that it had abandoned and discontinued missionary labors in 1847, as alleged in said bill of complaint.

And denies that about the year 1854 it caused the said tract of 643.37 acres of land to be surveyed, but says and admits that formal notification of its claim to said tract of 643.37 acres was filed in the office of the surveyor-general of Oregon in the year 1854, by Rev'd Thos. H. Pearne, its agent.

58 Defendant admits th*at* proceedings had in the land department of the government, as alleged in complainants' bill, but it denies that the decision of the Secretary of the Interior as finally rendered in said controversy was wrongful, unjust, or illegal; and denies that it was made under a misapprehension or mistake of either law or fact in regard to the rights of the complainants or of the said W. D. Bigelow.

Denies that there was no evidence whatever before the said Secretary of the Interior showing or tending to prove that any portion of the said tract of 643.37 acres of land was occupied as a missionary station by the defendant after the month of September, 1847; and defendant denies that all the evidence before the said secretary showed that defendant had abandoned said missionary station in the month of September, 1847, without any intention to again occupy the same as a missionary station.

And the defendant denies that the said patent was issued to it in violation of the rights of the said Bigelow or of the rights of the complainants.

Defendant denies that on the 14th day of August, 1848, it occupied a tract of land as a missionary station near the town of Salem, in Oregon Territory; but says it was in possession of a tract of land near Salem aforesaid, which its agent, Rev. Thomas H. Pearne, on the 30th day
59 of April, 1853, claimed under the said second proviso of the first section of the said act of Congress approved August 14, 1848; and that the said Thomas H. Pearne, on the said 30th day of April, 1853, filed in the office of the register of the land office at Oregon City, a notification of the claim of the defendant to a tract of land containing 97.39 acres, situated in sections 23 and 26, in T. 7 S., R. 3 W.

Defendant denies any knowledge or information sufficient to form a belief as to whether afterwards, or at any time, the Commissioner of the

General Land Office directed the surveyor-general of Oregon to determine the validity of the said claim, or as to whether the said surveyor-general in the year 1861, or at any *any* other time, decided that the defendant was entitled to said tract of land under the said act of Congress approved August 14, 1848, or whether said pretended decision was affirmed by the Commissioner of the General Land Office, or whether its title to the said tract of land has been

60 P'g. 9. 1 since that time acknowledged by the United States.

2 Defendant denies that the title under the said
3 act of Congress approved August 14th, 1848, to said
4 tract of 97.39 acres of land has been unquestion-
5 ed by any one; but defendant says that about the year
6 185 one Joseph Watt, of Salem, aforesaid, filed
7 a notification of his intention to claim said tract
8 of land under the provisions of an act of Congress
9 approved Sept. 27th, 1850, commonly known as the "do-
10 nation law," and entered upon, resided upon,
11 and cultivated said tract, as he was required
12 to do to secure a title thereto under the said
13 act of September 27th, 1850, and the defendant has
14 never been allowed a patent therefor.
15 Defendant says that it has the right to more
16 than one tract of land under the said act of Aug-
17 ust 14th, 1848, and claims that it has a right to
18 as many tracts of land as it occupied as mis-
19 sionary stations among the Indian tribes on the
20 *on the* 14th day of August, 1848, within the meaning
21 of the act aforesaid.
22 This defendant, further answering the complainants'
23 bill, says: Prior to the year 1840, through its agent and
24 missionaries duly authorized and empowered to act
25 for it in that behalf, caused a missionary station
26 to be established at a point on the Columbia River,
27 then known as Wascopum, which

28 point was at what was the' called The Grand Dalles,

61 of said river; and its said agents and missionaries then made claim to a tract of land at that point for the purpose of carrying on the missionary labors in which they were then engaged, which said tract of land is the same, as nearly as defendant, by a survey, could ascertain, as the tract of 643.37 acres described in complainants' bill. And defendant says that it opened a farm upon said tract of land, erected thereon a dwelling-house, a church, and other buildings which were requisite and necessary for successfully carrying on its missionary labors. And from the time it so took possession of said land it carried on its proper missionary labors there continuously, with vigor and effect, until about the month of September, 1847, having during the period it had occupied and labored at that place expended not less than thirty thousand in organizing, supporting, and carrying forward its missionary work.

That about the month of August, 1847, while said station was in full and vigorous operation under the charge of the agents and missionaries of the defendant, an arrangement was effected between the agent of the de-

fendant and one Dr. Marcus Whitman, then an agent of the "American Board of Commissioners of Foreign Missions," a duly incorporated society incorporated and existing under the laws of the State of Mas-
62 sachusetts, and then engaged in missionary labor in Oregon Territory, and particularly in that portion of said Territory which lay east of the Cascade Mountains, by which it was agreed that the said agent of the said missionary station, instead of the agents and missionaries of the defendant, provided the said agent of the said American board would agree to and would cause the said missionary labors to be continued there as they were then carried on by the defendant missionaries, and provided, further, that the said agent of the said American board would deliver to the agent of the defendant a check for the sum of six hundred dollars upon the said American board for certain personal property which was owned there by the defendant, and which the said agent of the said American board desired to purchase, to all of which the said agent of the said American board agreed, and thereupon drew the said check for the said sum of six hundred dollars for said personal property and delivered the same to the agent of the defendant, and about the month of September, 1847, with the distinct understanding that said missionary labors were to be continued at said station by said American board, and without any design of abandoning or discontinuing missionary labors or of permitting it to be done, the defendant's agents and missionaries withdrew from said station, and permitted the said agents of the said American board to take pos-
63 session thereof. But the defendant's agents and missionaries would not have withdrawn or have permitted the said agents of the said American board to take the said possession but for the said understanding and agreement that the said American board would continue the same as aforesaid.

That the defendant did not sell or dispose of, or receive any pay or any consideration whatever for, the said station, or for the valuable improvements place' thereon by it at a great expense; that it was the intention of the said Dr. Marcus Whitman, and the understanding of the agent of the defendant at the time said agreement was made, that the said Dr. Whitman should take charge of said station as the agent of the said American board and conduct the missionary labors in person.

That as soon as the temporary possession of said station was placed in his hands the said Dr. Whitman proceeded to make arrangements to take permanent possession thereof in person, and in making which he was necessarily required to be temporarily absent therefrom, during which time he provided other agent' of said American board to take temporary charge and to conduct missionary labors in his absence.

That during his absence he was attacked by the hostile Indians, who at that time had risen against the whites, and he and a number of other persons were murdered by them, so that it was not possible for
64 him to return and take possession of said station, as he had intended, and to conduct the said missionary labors there.

That the said Dr. Whitman was murdered about the 27th day of November, 1847, and the agents left by him in temporary charge of said station were driven therefrom in a few days thereafter and were compelled to flee for their lives, by the hostile Indians; that the Indian hostilities continued in that country for a long time, rendering it injudicious, unwise,

and unsafe for either the agents of the said American board or the agents of the defendant to return to the said station until long after the 14th day of August, 1848.

That on account of the death of the said Dr. Whitman, and on account of the Indian war which continued in that country—then and since known as the Cayuse war—and on account of a proclamation and protest of one H. A. G. Lee, then a superintendent of Indian affairs under the provisional government of Oregon Territory, made on or about the month of July, 1848, and published at the time, warning Protestant missionaries not to venture into the said country, it became and was impossible for the said American board to do more than take temporary possession of said station, and therefore the remaining agents of the said American board, in the year 1849, and before the said Indian war was so far settled as to render it either judicious, wise, or safe for Protestant missionaries to resume missionary labors there, and in order to place the defendant
65 in the rightful possession of what justly belonged to it, offered to retransfer the said station to the defendant upon the defendant delivering to the agent of the said American board the said draft for six hundred dollars; that the agent of the defendant accepted the said offer, delivered up the said draft to the agent of the American board, who cancelled the same, and the agent of the defendant at once resumed control of the said station.

That about the month of June, 1850, Rev. William Roberts, then superintendent of the defendant's missionary affairs in Oregon, and as agent of the defendant, went to the said missionary station at the Dalles in company with Rev. Alvin F. Waller, one of the missionaries then, and for a long time prior thereto, in the service of the defendant, and who was in charge of said station at the time the same was allowed to pass temporarily into the possession of Dr. Whitman, in September, 1847, as hereinbefore stated. That at their arrival at said station it was not occupied by any one except the military, which had been occupying the same continuously since the month of December, 1847. That all the buildings which had been erected upon said grounds by the defendant, and which were in a good condition when the said possession was allowed to pass into the hands of the
66 said Dr. Whitman as aforesaid, were then wholly destroyed or greatly injured as were also all other improvements which had been placed upon said tract of land at a great expense, to defendant, for the purpose of making the same useful as a missionary station. That the said Roberts and Waller went to the said station in the said month of June, 1850, for the purpose of resuming missionary labors there among the Indian tribes, and to make an accurate survey and mark out the tract of land to which the defendant was entitled under the said act of Congress approved August 14th, 1848. That at that time the said Roberts and Waller, with the aid of a surveyor, surveyed and marked out the tract of land which the defendant claimed, and to which it was entitled as a missionary station under the said act of Congress approved August 14th, 1848, and in locating and surveying the same they followed, as nearly as they were able to do, the lines which it was then understood had been designated for the boundary of said missionary station by the original founders thereof in 1836, the Rev. Jason Lee & H. B. Brewer and others, the land so marked out and surveyed being the 64337 acres described in complainants' bill, and

for a part of which defendant now holds a patent bearing date July 9th, 1875. And defendant says that while said Roberts and Waller
67 were at said station in June, 1850, the said Waller held religious services there as missionary among the Indian tribes, but did not continue such labor for the reason that he was forbidden to do so by the military officer then in command of the troops at that place. That the said tract of land containing 643.37 acres was then taken possession of by the said Roberts as the agent of the defendant, so far as he was able or was permitted to do by the said military officer, and that he re-established and resumed missionary labors there to as great an extent, and continued the same as long as he was permitted to by the said military officer then in command, and that he caused the survey of said land and the notification thereof to be recorded in the record of land claims in Clackamas County, in said Territory of Oregon, on the 16th day of November, 1850, said missionary station and mission claim being then within Clackamas County.

That on the 28th day of February, 1859, the said American board released all its right, title, and interest in and to the land and other property at the Dalles, to this defendant by it' quit-claim deed duly executed and acknowledged on that day, in order to quiet any doubts as to the title of the defendant to said missionary station, and that the defendant has ever since held and still holds the said deed, which was duly recorded in the records of deeds of Wasco County on the 9th day of May,
68 1859. And defendant further says that about the month of March, 1854, Rev. Thos. H. Pearne, then the agent of the defendant, and for and in its behalf and in its interest, caused a notification of defendant' claim of title to said missionary station, containing 643.37 acres of land, under said act of Congress approved August 14th, 1848, with supporting evidence accompanying the same, to be filed in the office of the surveyor-general of Oregon. And defendant says that long after it had become the owner of said tract of land under the said act of Congress approved August 14, 1848, and long after it had caused the same to be surveyed and marked by proper posts, stakes, and monuments, and had caused notice of said survey to be recorded in the record of land claims in the office of the recorder of said Clackamas County, the said W. D. Bigelow, about the month of November, then well knowing of the defendant's claim to said tract of 643.37 acres, and well knowing that the defendant claimed, held, and owned the same under the provisions of said act of Congress approved August 14th, 1848, wrongfully undertook to enter upon and to claim, and did wrongfully claim and pretend to have a right to hold and to acquire a title to a portion of the defendant's said tract of 643.37 acres, to wit, about 27 acres thereof, a particular description of which is contained in complainants' bill, and by reason of his such wrong-
69 ful, unjust, and unlawful claim the said Bigelow caused a controversy to arise between the said Bigelow and this defendant concerning the title to the same, which the surveyor-general of Oregon was directed by the Commissioner of the General Land Office to hear and determine.

That in pursuance of said direction the surveyor-general, about the year 1860, after giving due notice to the said contesting parties, proceed' to take testimony produced before him by the said Bigelow in support of his claim and of the defendant in support of its claim, and that about the year 1861,

said surveyor-general erroneously decided said controversy against the claim of the defendant and in favor of the claim of said Bigelow, notwithstanding the evidence before him showed and clearly proved that the defendant and not Bigelow was the lawful and rightful owner. That the defendant appealed from the said erroneous decision of the surveyor-general to the Commissioner of the General Land Office, who, acting under a misapprehension and mistake of both the facts and the law applicable to the said controversy, affirmed the said decision of the surveyor-general; and thereupon the defendant appealed again from the said decision of the said Commissioner to the Secretary of the Interior, and the said Secretary, after a full, due, and careful examination of the evidence
70 produce' in said controversy, and of the law applicable thereto, reversed the said erroneous decision of the Commissioner of the General Land Office, and decided and held that the defendant was the legal and rightful owner of said tract of land, and that the said Bigelow was not, which decision of said Secretary was right, just, and legal. Said decision was rendered on the 15th day of March, 1875, and thereafter, on the 9th day of July, a patent including the said premises claimed by said Bigelow was issued to the defendant. And defendant says that at the time of the pretended and alleged conveyance to them of the said tract of 27 acres of land, as described in the bill of complaint, by the said W. D. Bigelow, said complainants had full notice of defendant's right, title, and interest in the said tract of land, and then well knew that the defendant and not the said Bigelow was the lawful and rightful owner thereof, and that the said Bigelow had no right in said land which he did or could convey to the complainants' herein.

And defendant further says that after the title to the said tract of land (643.37 acres) had been confirmed in it by the said act of Congress approved August 14th, 1848, the military authorities of the United States established a military reservation over a tract of land near the said
71 Dalles, which extended over and included about 353 acres of the defendant's said mission claim. That afterwards the defendants presented a claim for $20,000 to the Secretary of War for damages it sustained by reason of the taking of the said 353 acres of its land for said military reservation.

That the said claim was referred by the Secretary of War to Major Rains in the year 1853, he being then in command of the military forces then stationed at the post then established upon said military reservation, for his report upon the merits of said claim and the right of the defendant to the said 353 acres of land. That the said Major Rains, having duly and fully examined and inquired into the facts concerning the defendant's right to said mission claim, reported to the Secretary of War on the day of , 185 , in favor of said claim, and recommended that the sum demanded be paid. That afterward the Secretary of War referred said claim to the Congress of the United States, and recommended that an appropriation be made for its payment. That said claim was referred by the House of Representatives to its Committee on Military Affairs of the 35th Congress, and after a full examination of said claim, and the right of the defendant to said tract of land under the said act of Congress approved August 14th, 1848, said committee reported in favor of defendant's title to said land, and in favor of the payment of the said sum of $20,000, said

72 report being dated January 28th, 1859, and is found in House of Reps. Reports, No. 145, 2' session, 35' Congress, and in pursuance of said report the said sum of $20,000 was appropriated by an act of Congress entitled "An act for the relief of the Missionary Society of the Methodist Episcopal Church," approved June 16th, 1860, and the said sum was afterward paid to defendant. Of all of which the complainants had full notice before and at the time they undertook to purchase, and pretend to have purchased, said 27 acres from said Bigelow. And the defendant further says that the temporary possession of the said missionary station by the said agents of the said American Board of Commissioners of Foreign Missions, under the said agreement with the agent of defendant, and the

(Page 22) 1 failure of the said agents of the said American Board
2 to comply with said agreement, and the state of
3 war, which prevented the agents and mission-
4 aries of the defendant from resuming posses-
5 sion of said station after the agents of the said
6 American board were driven therefrom, in 1847,
7 by hostile Indians, until long after the 14th day
8 of August, 1848, did not destroy, impair, or affect the
9 defendant's claim to said missionary station, con-
10 taining the said 643.37 acres of land, nor in any
11 manner affect its right thereto under the said act
12 of Congress approved August 14th, 1848, but defendant's
13 right thereto under the said act remained the
73 (Page 22)14 same as if the said agents of the said American Board
15 of Commissioners of Foreign Missions had not had tem-
16 porary possession thereof, or a state of war had
17 not existed, and the agents of the defendant
18 had retained and been in actual possession
19 thereof until and on the said 14th day of August,
20 1848. That the complainants have acquired no
21 right in the said 27 acres of land, nor in
22 any part thereof, through the said claim of the
23 said Bigelow, as against the rights of the defend-
24 ant, and there is no equity in the said bill, and
25 the prayer thereof ought not to be granted, but
26 should be denied and the said bill dismissed.
27 All of which matters and things this defendant is
28 willing to aver, maintain, and prove, as

this honorable court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

J. C. CARTWRIGHT,
RUFUS MALLORY,
*Solicitors for Defendant.*

DISTRICT OF OREGON, *ss:*

I, John C. Cartwright, being duly sworn, depose and say I am agent and attorney for the defendant in the above-entitled suit, and that the foregoing answer as well the answers to interrogatories hereto appended
74 are true, as I verily believe.

J. C. CARTWRIGHT.

Subscribed and sworn to before me this 12th day of August, A. D. 1878.

R. H. LAMSON, *Clerk.*

Defendant answering the special interrogatories in the said complainants' bill of complaint contained, and answering each and all of them, answers and says:

To interrogatory numbered one the defendant answers no.

To interrogatory numbered two the defendant answers no.

To the interrogatory numbered three the defendant answers yes, within the meaning of the act of Congress approved August 14, 1848, confirming said tract of land to defendant.

(Endorsed:) Filed August 12th, 1878. R. H. Lamson, clerk.

74½ And afterwards, to wit, on the 28th day of September, 1878, there was duly filed in said court exceptions to parts of answer, in words and figures as follows, to wit:

75 *Exceptions.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY, AARON E. WAIT, AND Phoebe M. Humason, complainants,
*vs.*
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendants.

The said complainants now come and except to the following described portion of the defendant's answer, for the reason that the same is impertinent and irrelevant, to wit:

All that part of said answer commencing with the 22d line of page nine (9), and ending with the word "dismissal," in the twenty-sixth (26) line of page (22) twenty-two.

JAMES K. KELLY,
*Solicitor for Comp'ts.*

(Endorsed:) Filed Sept. 28, 1878. R. H. Lamson, clerk.

75½ And afterwards, to wit, on Monday, the 28th day of October, 1878, the same being the 8th judicial day of the regular October term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in this cause, to wit:

76 *Order.*

In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

JAMES K. KELLY, AARON E. WAIT, AND Phœbe M. Humason
*vs.*
THE MISSIONARY SOCIETY OF THE M. E. CHURCH. — No. 391. October 28th, 1878.

Now at this day comes the complainants by Mr. James K. Kelly, of

counsel, and the defendant by Mr. Rufus Mallory, of counsel, and, on motion of said complainants, it is ordered that this cause be set for hearing on the exceptions filed to the answer herein on Friday November 1st, 1878.

(Signed) DEADY, *J.*

(Endorsed:) Filed Oct. 28, 1878. R. H. Lamson, clerk.

76½ And afterwards, to wit, on Friday, the 1st day of November, 1878, the same being the 9th judicial day of the regular October term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in this cause, to wit:

77 *Order.*

In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

JAMES K. KELLY, AARON E. WAIT, AND Phœbe M. Humason. *vs.* THE MISSIONARY SOCIETY OF THE M. E. CHURCH. | No. 391. November 1st, 1878.

Now at this day come the complainants by Mr. James K. Kelly, of counsel, and the defendant by Mr. Rufus Mallory, of counsel, and, on motion of said defendant, it is ordered that the hearing of this cause on the exceptions to the answer herein be, and the same is hereby, continued till Tuesday, November 5th, 1878.

(Signed) DEADY, *J.*

(Endorsed:) Filed November 1st, 1878. R. H. Lamson, clerk.

77½ And afterwards, to wit, on Thursday, the 5th day of November, 1878, the same being the 11th judicial day of the regular October term of said court, present, the honorable Matthew P. Deady, United States district presiding, the following proceedings were had in this cause, to wit:

78 *Order.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY, AARON E. WAITE, AND Phebe M. Humason *vs.* THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church. | No. 391, November 5, 1878.

Now at this day come the complainants by Messrs. James K. Kelly and N. Gates, of counsel, and the defendant by Messrs. John C. Cartwright and Rufus Mallory, of counsel, and this cause comes on to be heard on the

exceptions filed to the answer herein; and the court, having heard the argument of counsel, will advise thereof.

78½ And afterwards, to wit, on Monday, the 18th day of November, 1878, the same being the 13th judicial day of the regular October term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in this cause, to wit:

79 In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

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| JAMES K. KELLY, AARON E. WAIT, AND PHŒBE M. HUMASON *vs.* THE MISSIONARY SOCIETY OF THE M. E. CHURCH. | No. 391. November 18, 1878. |

Now at this day come the complainants by Mr. James K. Kelly, of counsel, and the defendant by Mr. Rufus Mallory, of counsel, and this cause having been heretofore heard on the exceptions filed to the answer herein, and taken under advisement by the court; and now at this day the court being fully advised in the premises, it is ordered and adjudged that said exceptions be, and they are hereby, disallowed, and that complainants have ten days in which to file their reply herein.

(Signed) DEADY, *J.*

(Endorsed:) Filed November 18th, 1878. R. H. Lamson, clerk.

79½ And afterwards, to wit, on the 20th day of November, 1878, there was duly filed in said court a replication in words and figures as follows, to wit:

80 *Replication.*

In the circuit court of the United States for the district of Oregon.

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| JAMES K. KELLY, AARON E. WAIT, AND PHŒBE M. HUMASON, comp'ts, *vs.* THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, def't. | |

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto say that they do and will aver, maintain, and prove their said bill to be true, certain, and suffi'ent in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by these repliants, without that, that any other matter or thing in said bill contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or

avoided, traversed or denied, is true. All of which matters and
81 things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and hereby humbly pray as in and by their said bill they have already prayed.

N. H. GATES,
*Solicitor for Comp'ts.*

(Endorsed:) Filed Nov. 20, 1878. R. H. Lamson, clerk.

81½ And afterwards, to wit, on Monday, the 6th day of Octobe, 1879, the same the 1st judicial day of the regular October term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in this cause, to wit:

82 *Order.*

In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

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| JAMES K. KELLY, AARON E. WAIT, AND PHEBE M. HUMASON, *vs.* THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church. | No. 391. October 6, 1879. |

Now at this day come the defendant by Mr. John C. Cartwright, of counsel, and the complainants by Mr. James K. Kelly, of counsel, and by agreement of parties, it is ordered that this cause be, and the same is hereby, set for trial on Wednesday, October 15th, 1879.

(Signed) DEADY, *J.*

(Endorsed:) Filed Oct. 6, 1879. R. H. Lamson, clerk.

83 *Order.*

And afterwards, to wit, on Monday, the 13th day of October, 1879, the same being the 4th judicial day of the regular October term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said court, to wit:

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| JAMES K. KELLY, AARON E. WAIT, AND PHEBE M. HUMASON *vs.* THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church. | No. 391. October 13, 1879. |

Now at this day come the complainants by Mr. James K. Kelly and Mr. N. H. Gates, its solicitors, and the defendant by Mr. Rufus Mallory and Mr. John C. Cartwright, its solicitors, and this cause comes on to be heard on the bill, answer, testimony, and exhibits.

83½ And afterwards, to wit, on Wednesday, the 3d day of December,

1879, the same being the 30th judicial day of the regular October term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said cause, to wit:

84 *Decree.*

In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

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| JAMES K. KELLY, AARON E. WAIT, AND PHEBE M. Humason *vs.* THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church. | No. 391. December 3, 1879. |

This cause having been heretofore heard on the bill, answer, reply, the testimony, and exhibits, and argued by Mr. James K. Kelly and Mr. N. H. Gates, of counsel for said complainants, and by Mr. Rufus Mallory and Mr. John C. Cartwright, of counsel for said defendant, and taken under advisement by the court, and now at this day the court, being fully advised in the premises, does find that the equity of the case is with the complainants; that the land described in the bill of complaint herein, to wit, a portion of the donation land claim of Windsor D. Bigelow, and bounded and described as follows: Beginning at the southeast corner of a tract of land containing six hundred and forty-three acres and thirty-seven one-hundredths of an acre, in sections thirty-three and thirty-four, in township two north, of range thirteen east,
85 and in sections three and four, in township one north, of range thirteen east of the Wallamett meridian, for which a patent was issued to the defendant by the United States on July ninth, one thousand eight hundred and seventy-five, and running thence west thirty-three chains and seventy-five links to the eastern boundary of the Fort Dalles military reservation; thence north thirty-two degrees and thirty minutes east, along the last named boundary line, five chains and fifty links to the line of the military reservation as established by Major D. H. Rains; thence south seventy-five degrees east four chains and twenty-five links to the southeast corner of said military reservation, as established by Major Rains; thence north fourteen degrees and twenty-three minutes east, on the eastern boundary of the said military reservation, ten chains and fifty links to the north boundary of Webster street in what is known as the Bluff addition to Dalles City; thence south sixty-six degrees east twenty-five chains to the east boundary of said land so patented to the defendant; thence south five chains to the place of beginning, containing twenty-seven acres, more or less, excepting blocks twenty-eight and twenty-nine in said Bluff addition to Dalles City, was voluntarily aban-
86 doned by the defendant as a missionary station in September, one thousand eight hundred and forty-seven, and was not thereafter occupied by the defendant as a missionary station or otherwise, and that the same was not confirmed to the defendant by the second proviso of section one of the act of Congress entitled "An act to establish the territorial government of Oregon," approved August fourteenth, one thousand

eight hundred and forty-eight; that the patent issued to the defendant by the United States on July ninth, one thousand eight hundred and seventy-five, for and including the said described lands, was wrongfully issued; that the complainants are the owners in fee of the said described lands by virtue of a grant under the act of Congress entitled "An act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey, and to make donations to settlers of the said public lands," approved September twentieth, one thousand eight hundred and fifty, to Winsor D. Bigelow, and by sundry mesne conveyances from him to said complainants, and are entitled to the patent therefor. It is therefore adjudged and decreed that the defendant received the patent for the above described lands as trustee for the several complainants herein, and that said defendant do, within ninety days from the date hereof, convey to said complainants, by a good and sufficient deed of con-
87 veyance, containing proper covenants against its own acts, to be approved by the master of this court, all the right, title, and interest in the above described lands, which it received by means of said patent, and that it pay to said complainants their costs and disbursements herein, taxed at dollars.

(Signed) DEADY, *J.*

(Endorsed:) Filed December 3, 1879. R. H. Lamson, clerk.

87½ And afterwards, to wit, on the 3d day of December, 1879, there was duly filed in said court a decision of Judge Deady, in words and figures as follows, to wit:

88 *Judge Deady's decision.*

DECISION IN THE U. S. CIRCUIT COURT, DEADY, J.

U. S. circuit court, district of Oregon.

WEDNESDAY, *Dec.* 3, 1879.

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|---|---|
| THE MISSIONARY SOCIETY OF THE M. E. CHURCH *v.* | To establish a trust and for a conveyance. |
| JAMES K. KELLY, AARON E. WAIT, & PHŒBE HUMASON *v.* THE SAME. | No. 391. The same. |

(1.) GRANT TO MISSIONS IN OREGON.—The grant to religious societies of mission stations in Oregon, contained in § 1 of the act of August 14, 1848 (9 Stat., 323), is not confined to a single station to each society, but includes as many stations as were then actually occupied by each society for missionary purposes among the Indians.

(2.) PATENT—SURVEY.—A patent issued under § 2447 of the R. S. upon a survey not approved by the surveyor-general is void; and in case of a grant under § 1 of the act of Aug. 14, 1848, the survey to be approved

by the surveyor-general necessarily involves the determination of the question: What is the quantity and boundary of the claim?

(3.) MISSION STATION.—The grant to religious societies contained in the act aforesaid of the missionary stations occupied by them in Oregon on August 14, 1848, not exceeding 640 acres, is not confined to the land actually enclosed and cultivated by them, but should be construed to include the maximum quantity at each station occupied by them—that is, claimed and in any way used by them, and not in the actual occupation of any one else.

(4.) OCCUPATION OF MISSION STATION.—Occupancy is a word of narrower signification than possession, and means to possess by laying hold of or being actually upon the thing possessed continuously and exclusively. Prior to August 14, 1848, the title to all lands in Oregon was in the United States, and therefore no person could have constructive possession of any portion thereof, or any possession thereof, or interest therein, except actual possession or occupancy, and when this was given up or abandoned the relation of the party to the land was absolutely terminated.

(5.) MISSION STATION AT THE DALLES.—The Missionary Society of the M. E. Church established a mission among the Indians at Wascopam, near the Grand Dalles of the Columbia, in 1838, and in September, 1847, abandoned and transferred the same to Dr. Whitman, of the Presbyterian mission at Wallatpu, and never reoccupied the same: Held, that the society did not receive a grant of said station under § 1 of the act of August 14, 1848, because it was not at that date in the actual possession and occupation of the premises; that such occupation was a condition precedent to the taking effect of such grant, and therefore it mattered not whether the failure of the society to occupy the station in August, 1848, was voluntary or was caused by the fear of hostile Indians.

(6.) PAYMENT BY CONGRESS.—The payment by Congress to the missionary society of $20,000, in June, 1860, on account of the reservation of 353 acres of The Dalles mission station in March, 1850, for military purposes, and the loss or destruction of property thereon since 1847, by Oregon volunteers, Indians, or United States troops, did not have the effect to invest the society with the title to such station then or on August 14, 1848; nor was it even an admission that the society had any legal right to the premises, but only that it asserted some kind of a claim thereto which it was deemed expedient to extinguish; nor could Congress, in June, 1860, by a direct recognition of a prior grant to the society, affect the rights of others already acquired in the premises under the town site and donation acts.

DEADY, J.

These three suits were commenced on September 18, 1877, in the circuit court for the State in the county of Wasco. The summons was served by publication, and on September 12 the defendant appeared and had the causes removed to this court, where they were entered on January 30, 1878.

On April 9 there was a demurrer filed to each complaint, which was disallowed, and thereupon, by the direction of the court, on May 2, the plaintiffs in each suit restated their case in the manner of a formal bill in equity. On August 12 the defendant answered the bills, and on September 20 the plaintiffs filed the general replication. In the course of the proceedings

exceptions for impertinence were taken to both the bills and the answers, which were disallowed, and questions raised thereby reserved for consideration upon the final hearing.

On October 15, 1879, the causes were heard together upon the several bills, answers, replications, and the exhibits and depositions in each, and in No. 390, so far as they were applicable to the other two.

Before touching the grounds of the controversy between the parties, it may be well to state their respective cases, so far as they rest upon either the admitted facts or those established beyond controversy.

The defendant is a corporation formed under the laws of New York, and from 1838 to September, 1847, maintained a mission among the Wascopam Indians on the south bank of the Columbia River, at the lower end of the Grand Dalles thereof, at a place since called "The Dalles," in what is now Wasco County; and on July 9, 1875, received a patent from the United States under § 2447 of the R. S. for a tract of land, containing 643.37 acres, including the ground occupied by the improvements made at such mission, less 350 acres thereof included in the military reservation, the same being parts of sections 3 and 4, in T. 1 N., of R. 13 W., and section 33, in T. 2 N., of R. 13 W. of the Wallamet meridian, as a mission station occupied by it on August 14, 1848, within the purview of the second proviso to § 1 of the act of that date "To establish the territorial government of Oregon" (9 Stat., 323), which provides "that the title to the land, not exceeding 640 acres, now occupied as missionary stations among the Indian tribes of said Territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong."

The plaintiffs claim that the defendant did not occupy this tract, or any portion of it, as a missionary station, or otherwise, on August 14, 1848, or since September, 1847, and that therefore it was not within the purview of said proviso, and the patent to the defendant was wrongfully issued; and also that they are the owners of and entitled to the patent for certain portions of said tract, as hereinafter stated, and ask to have their several rights therein established and declared, and that the defendant be so far regarded as their trustee and required to convey to them accordingly.

In 1852 the place called "The Dalles" was occupied as a town site for the purpose of business and trade, and has been so occupied ever since, and in 1855 the county of Wasco caused the same to be surveyed into lots, blocks, and streets, and said survey to be recorded; that on January 26, 1857, the plaintiff in 390, Dalles City, was made a municipal corporation, with boundaries including said town site, and on April 18, 1860, entered, at the proper land office, the fractional NW. $\frac{1}{4}$ of said section 3, containing 112 acres, and including the land so occupied as a town site, under the town site law of May 23, 1844 (5 Stat., 667; 10 Stat., 206), in trust for the several use and benefit of the occupants thereof according to their respective interests, and now claims to be the owner thereof accordingly.

On November 1, 1853, Winsor D. Bigelow became a settler under the donation act upon 320 acres of the public land, including parts of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{2}$ of said section 3, and now known upon the plats of the public surveys as donation claim No. 40, and resided upon and cultivated the same until February 16, 1860, and otherwise complied with the require-

ments of said act; that on December 9, 1862, said Bigelow conveyed an undivided $\frac{1}{3}$ interest of a certain 27 acres of said donation to James K. Kelly and Aaron E. Wait, plaintiffs in No. 391; and on December 12, 1864, conveyed the remaining $\frac{2}{3}$ of said 27 acres to Orlando Humason, who, on September 8, 1875, died testate, having devised the same to Phœbe Humason, his widow, and a plaintiff in No. 391, which 27 acres said plaintiffs, by reason of the premises, claim to own as tenants in common thereof.

On December 2, 1864, said Bigelow conveyed to said Kelly and Wait, the plaintiffs in No. 392, 46 town lots within the limits of his said donation, and situate in what is known as the "Bluff addition to Dalles City," which lots the plaintiffs in No. 392, by reason of the premises, claim to own as tenants in common thereof.

It is claimed by the defendant that in August, 1847, it agreed to turn over the missionary station at The Dalles, with the improvements thereon, to Dr. Marcus Whitman, the agent of the American Board of Commissioners for Foreign Missions, and then engaged as a lay missionary of said board, at a place called Wallatpu, about 140 miles E NE. of The Dalles, upon the understanding that said board would maintain a mission there among the Indians, and that said Whitman would pay $600 for certain personal property belonging to the mission; that in pursuance of said agreement said Whitman gave the defendant a draft upon said board for said $600, and the defendant's agents and missionaries, between September 1 and 10, 1847, surrendered the station to said Whitman; that owing to the death of said Whitman, on November 29, 1847, said agreement
89 was canceled in 1849 by the surrender of said draft to the agent of said board and the "retransfer" of said station to the defendant, who thereupon resumed control of the same; that in June, 1850, the agent of the defendant went upon the ground and surveyed and marked the boundaries of the claim, as he understood them to be, and that in 1854 the Rev. Thomas H. Pearne, its agent, notified the surveyor-general of the Territory of the claim of the defendant thereto; but said defendant substantially admits that from the delivery of said station to Whitman as aforesaid, it never actually occupied the same for mission purposes, or otherwise, and claims that it was prevented from so doing by the danger from Indian hostilities, growing out of what is known as the Cayuse war.

The Commissioner of the General Land Office authorized the surveyor-general to hear and determine the conflicting claims of the defendant Bigelow and Dalles City to the premises, and on February 16, 1860, the parties appeared before him, and on February 2, 1861, said officer decided that the defendant had no right to the land in controversy; which decision, on an appeal to the Commissioner, was, on February 7, 1863, affirmed. From there the case was carried by appeal before the Secretary of the Interior, who, on March 15, 1875, reversed said decision and decided that the defendant was entitled to the premises as a mission station, and directed a patent to issue to it accordingly.

Section 2447 of the R. S., under which this patent issued to the defendant, is taken from the act of Dec. 22, 1854, authorizing the issue of patents in certain cases, and only applies where there has been a grant by statute without a provision for the issue of a patent. In such a case the section provides that a patent may issue for the grant "upon a survey thereof,

approved by the surveyor-general," and "found correct by the Commissioner;" subject, however, to the qualification that "such patent shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land."

The patent in question expressly declares that it is issued to the defendant subject to this qualification. There is then no question in this case of the power of this court to investigate the grounds upon which this patent was issued and to determine that they were insufficient or otherwise, either in law or fact, and decree accordingly. The patent and the subsequent action of the parties has had the effect to remit the case to this forum to try and determine to whom the patent should have issued for the portions of the tract claimed by the plaintiffs.

It is admitted that the plaintiffs are entitled to the patent for the portions claimed by them unless the defendant was entitled to the tract as a mission station under § 1 of the act of August 14, 1848.

On April 30, 1853, the defendant, by its agent, Rev. Thomas H. Pearne, notified the land department of its claim to a mission station near Salem, in Marion County, the same being parts of sections 23 and 26 in T. 7 S., of R. 3 W. of the Wallamet meridian, and containing 97.39 acres, which claim was allowed.

And now the plaintiffs contend that under the act, a religious society can only receive a grant of one mission station, and the defendant, having elected to take the station at Salem, is therefore barred from claiming the one at The Dalles.

I do not think this is the most reasonable construction of the statute. It grants the land "occupied as missionary stations" to the several religious societies to which said stations respectively belong. It is true that this language would be satisfied with the grant of one station to each society. But it is broad enough, in my judgment, to cover more, if more there were, and ought to have effect accordingly, unless there is some controlling reason to the contrary in the circumstances of the case. If it had been the intention of Congress to limit the grant to one station to each society such intention would have been more naturally expressed by saying, "the land occupied as a missionary station to each religious society to which such station belongs." And this construction is strengthened rather than otherwise by reference to the surrounding circumstances. For some years prior to the passage of the act of August 14, 1848, there were three religious societies engaged in missionary labors among the Indians in Oregon—the Methodist Episcopal, the Presbyterian, and the Roman Catholic. The first missionaries of the former came to Oregon with Wyeth in 1834 and established a mission at Wallamet, below Salem, which was afterwards removed to the latter place. Subsequently their numbers were increased, and they established missions at The Dalles, Nesqually, and Clatsop. The Presbyterian missionaries came to the country under the auspices of the American board in 1836, and established a mission at Wailatpu, near what is now called Walla Walla, with Marcus Whitman at its head. Afterwards they established missions at Lapwai and Spokan—all east of the Cascade Mountains. The Roman Catholic missionaries came from Canada with the Hudson Bay train in 1838. They established the mission St. Paul in the

Wallamet, near Champoeg, and Cowlitz on the Cowlitz River. Later they established missions in Eastern Oregon and held occasional missionary services among the Indians at many points in the country. In June, 1848, they established a mission at The Dalles, to the west and adjoining the land in controversy.

The country in which these grants were made was an immense territory, extending from the 42d to the 49th parallel of north latitude, and reaching from the Rocky Mountains to the Pacific Ocean. Outside of these missions and the Hudson Bay posts, practically, it was unoccupied, except sparsely in the Wallamet Valley. The missionaries were very properly regarded as having promoted the settlement and civilization of the country, and there was no reason why, if Congress saw proper to recognize their services either as settlers or missionaries, by granting them the land occupied by them as mission stations, it should confine the grant to one station to each society when more were occupied by it.

It is also insisted that this patent is void as not having been issued upon "a plat of survey thereof" approved by the surveyor-general, but upon the survey made by the agent of the mission, in June, 1850. I think it is plain that a patent issued upon a survey or diagram not approved by the surveyor-general would be void. For instance, a patent could not lawfully issue upon the survey of the claim by the society itself, because a survey of the grant involved the question of how much land was occupied by the mission and within what limits. To allow the society to do this would be to make it a judge in its own case.

The grant was only of the land occupied which might be less than 640 acres, and the surveyor-general was required to ascertain the quantity and its boundaries before he could approve a survey thereof to enable the department to issue a patent therefor.

When the surveyor-general was authorized to hear the contest between these parties, on February 23, 1860, he directed a deputy surveyor to make a survey of the premises: (1) as claimed by the society; (2) as actually occupied by it; and (3) so as to include its improvements with 640 acres south of the bluff, in substantially a square form. Plats of these surveys—the second one containing 87 acres—were forwarded to the Commissioner by the surveyor-general with his decision that the society was not entitled to any portion of the premises as a missionary station. Neither of these "plats of survey" were approved by the surveyor-general in the sense of the statute, because they were each made upon a hypothesis—that the society occupied the premises or some portion of them as a mission station on August 14, 1848—which he at the same time found not to be true.

But on March 29, 1875, and after the decision of the Secretary of the Interior, the Commissioner wrote to the surveyor-general advising him of such decision and directing him to furnish that office with a "certified diagram of the claim of said society" as confirmed by the same. In obedience to this direction the surveyor-general, on June 17, 1875, certified to the Commissioner a diagram of the first of the three surveys, as being a plat of the survey of the Methodist mission claim at The Dalles, and upon this the patent was issued as appears therefrom.

Whatever, then, may be thought of the correctness of the survey, the proposition that the patent was issued without a plat of survey approved

by the surveyor-general, in the face of these facts, is not tenable.

90 It is also contended by the plaintiffs that if the defendant is entitled to take under the act as a missionary society at all, the grant should be confined to the land actually occupied by it.

This grant, unlike the one made by the donation act, is not of the 640 acres occupied by the donee, but of the quantity occupied, not exceeding that number of acres. Still it could not have been the intention of Congress in the one case more than the other that the occupation of a donee should be limited to his actual enclosure and tillage. The donation act of September 27, 1850 (9 Stat. 497), was in this respect a sort of supplement to the act of August 14, 1848, and did for the settlers at large what the former had done for the missionaries. It gave to the settler then residing in the Territory, for himself and wife, the section of land which he had resided upon and cultivated for four consecutive years. But this residence and cultivation was not required to include the whole section. In fact, the actual enclosure and cultivation was often confined to a very few acres, while the remaining portion was only occupied for grazing, and sometimes hardly that.

Very early in the settlement of this country it became a cardinal rule that a settlement on the public lands should not include any more than a section. This was probably suggested by the terms of the Oregon bill introduced into the Senate by Dr. Linn, of Missouri, in 1842, which, among other things, proposed to give 640 acres of land to each white male inhabitant of the Territory over 18 years of age. Prior to this time the missionaries had claimed large areas at their several stations, but as generally there was no one to dispute such claim, it mattered little one way or the other. In December, 1843, the mission at Salem was surveyed and platted at 16 sections. But on July 5, 1843, the people adopted a land law which limited the extent of a claim or settlement to 640 acres, with a proviso that any mission "of religious character," established before that time, might contain six miles square. (Or. Laws, 1874, p. 50 n.)

Under these circumstances I think the grant to the missionary societies ought to be construed to include 640 acres at each mission station occupied by them—that is, claimed and used by them according to the circumstances of the time and place, and not in the actual occupation of any one else.

In the case under consideration there does not appear to have been any survey or marking on the ground of the boundaries or limits of the claim until June, 1850. But it was doubtless well understood by the occupants and the Indians that it should extend a certain distance in certain directions, or that it should include certain points or places—as, the improvements, the mill site, etc.; though I do not think that it was ever expected or intended that it should extend north of the bluff, between which and the river—a distance of about half a mile—were the villages and camping ground of the Indians and voyageurs up and down the Columbia River.

And this brings me to the consideration of the question, whether upon the evidence the defendant occupied this mission station so as to be entitled to the grant thereof under the act of August 14, 1848.

The evidence is somewhat meagre and upon some points contradictory. It consists largely of the testimony of persons deeply in sympathy with the defendant, to facts and circumstances occurring thirty years ago, and scattered over a considerable period of time. The correspondence between

the defendant and its agents here concerning the occupation and transfer of this station is not produced. It is presumed to have been in writing and within the knowledge and control of the defendant, and therefore the omission to produce it is a matter which must have more or less weight against the defendant, according to the circumstances of the case. Portions of the evidence partake of the character of hearsay, and some of it is decidedly argumentative. In considering it it will be impossible to ignore the history of the period and place to which it relates. Reading it, then, by this light, and, where it is contradictory or obscure, supplementing it from this source, the material facts about the settlement and occupation of the mission station at The Dalles are these:

In the spring of 1838 the Rev. Daniel Lee and Rev. H. K. W. Perkins, under the direction of the Rev. Jason Lee, the superintendent of the defendant in Oregon, established a mission station within the limits of the tract described in the patent herein, at a place then called Wascopam. In the fall of the same year it was stocked with cattle from the Wallamet Valley. The place was favorably situated for trade and intercourse with the Indians, and immigrants from the East—the latter usually, at this point, exchanging their wagons for boats and often bartering their poor oxen for supplies, such as fresh beef and the like.

In 1840 Mr. H. B. Brewer went to reside there as a farmer for the mission. Perkins and Lee left the mission for the East in 1844, and the Rev. A. F. Waller joined it about the same time. Waller and Brewer remained there until the transfer of the station to Whitman in 1847. In 1844 the Rev. George Gary superseded Jason Lee as superintendent of the Oregon mission. Apparently the society had become dissatisfied with the secular character and cost of the missionary operations, and sent Gary here to bring about a change in this respect. To this end, soon after his arrival in the Territory, the various mission stations, except The Dalles, and all the mission property, consisting mainly of large herds of horses and cattle, were disposed of to members of the mission; so that, after 1844, the defendant had no "mission among the Indian tribes" in Oregon, except at The Dalles. Thereafter, the labors of its faithful clerical missionaries, of whom but a few remained in the country, were devoted to the growing "white settlements" in the Wallamet Valley. In the language of one of them, "The finances of the Oregon mission were thus summarily brought to a close, and the mission was not only relieved of a ponderous load, but assumed a decidedly spiritual character." (Hines' Oregon, 242.)

In July, 1847, Mr. Gary was succeeded as superintendent of the mission by the Rev. William Roberts. Prior to this, and in the spring of that year, Mr. Gary had disposed of nearly all the live stock of The Dalles mission station, and was negotiating with Dr. Whitman for the transfer of the station itself. Mr. Roberts, in continuation of the policy manifested by his predecessor, followed up these negotiations until, in August, an agreement was made for the abandonment or transfer of the station to Whitman, together with the sale of a canoe, some farming utensils, grain, and household furniture, for the sum of $600; and between September 1 and 10, 1847, Messrs. Waller and Brewer, the agents of the defendant, delivered the possession of the premises to Whitman, who took actual possession thereof, and placed his nephew—Perrin B. Whitman, a youth of 17 years—in charge, while he proceeded to his mission station at Wailatpu.

Dr. Whitman was not a minister, but at the time of the transfer of this station to him it was understood and expected that religious services and instruction would be in some way kept up there for the benefit of the Indians; but there was no legal obligation to that effect, nor did the defendant or its agents have any intention or expectation of returning or occupying the station if such services and instruction was not furnished, or otherwise. In pursuance of the settled policy of the defendant, the station was absolutely and unqualifiedly abandoned to Dr. Whitman, without any reservation or right to resume the possession under any circumstances.

Dr. Whitman, whatever his purpose may have been in regard to the Indians, purchased the station primarily for himself and nephew, Perrin B., to whom he promised the west half of it if he would remain and take care of it until the spring, when the former intended to return there and make it his permanent home.

At the time the defendant abandoned this station there was about 70 acres under some kind of enclosure, about one-half of which had been under cultivation. There were 6 moderate sized buildings upon the premises—a dwelling, meeting, school, and storehouse, barn and workshop, built of logs, except the dwelling, which was a frame filled in with adobe. The buildings were plain and constructed mostly with Indian labor, and did not cost to exceed $4,000, at which valuation they were afterwards—on June 16, 1860—paid for by the United States upon the claim and estimate of the defendant to that effect. (See H. of R., Rep. No. 145, 2 ses. 35 Cong.; 12 Stat., 44.)

On November 20, 1847, Dr. Whitman and others were murdered at Wailatpu, by the Indians of that station, and this was followed by what is known as the Cayuse war, in which the people of Oregon, under the provisional government, undertook to chastise the Cayuse Indians for this massacre. By midsummer of 1848 hostilities had ceased and peace was established; and in the latter part of the summer the troops were withdrawn from the country and returned to their homes.

About December 16, Perrin B. Whitman, who had remained in charge of the station at The Dalles, being apprehensive of danger, left for the Wallamet Valley, taking with him Mr. Alanson Hillman, whom
91 his uncle had sent there from Wailatpu in October as a farmer and housekeeper. A detachment of volunteers soon after occupied the premises with the permission of said Whitman, and it remained in the possession of the troops of the provisional government until they were withdrawn from the country, as stated. Thereafter, the premises remained unoccupied, except occasionally by passing travelers and immigrants, until the spring of 1850, when a military post was establishedthere by the United States, and the premises included in a military reserve.

There never were any Indian hostilities at The Dalles or within 100 miles of the place. The immigrations of 1848 and 1849 came through the country without molestation, and from early in 1848 there was no more danger of Indian difficulties or hostilities at The Dalles than there was prior to September, 1847.

In the spring of 1849, the news of the passage of the organic act with the clause making a grant to missions reached Oregon. The death of Whitman had prevented the occupation of the station at The Dalles by him, either for himself or as the agent of the American board, or both.

The draft of $600 which he had given upon the board in payment for it, had never been presented. Whatever might be thought of the claim of the defendant there could be no ground for claiming the premises as a place ever occupied by the American board as a mission station. Thereupon, about the last of February or first of March, 1849, an arrangement was made between the superintendent of the Oregon mission and Messrs. Elkanah Walker, Henry H. Spaulding, and Cushing Eells, three missionaries of the American board, by which the station was retransferred to the defendant and the draft aforesaid cancelled; and this was done by the defendant, not with any view of resuming missionary work there among the Indians or otherwise, but solely to enable it to claim and obtain, if it could, a grant of the premises from the United States on account of its occupation prior to September, 1847, and the subsequent circumstances. To the same end and to assist it in obtaining damages from the United States for taking a portion of the station as a military reservation, the defendant, on February 28, 1859, obtained from the American board a formal deed of quit claim to the premises; although on November 3, 1858, Messrs. Walker and Eells, professing to act upon a power to them from said board, dated February 28, 1852, for a nominal consideration, had conveyed the premises, subject to the military reservation, to Messrs. M. M. McCarver and Samuel L. White.

Upon this state of facts there is no ground to claim that the defendant acquired the title to this station on August 14, 1848, under the act of that date. It had abandoned the place voluntarily and without any expectation or intention of returning, and was no more within the purview or operation of the act than if it had never been upon the ground. The grant only applies to such stations as were occupied on August 14, 1848. To occupy is to possess—not constructively but actually. The word is of a more limited signification than possession. It is derived from ob and capio—to lay hold of—and means to possess by having hold of or being actually upon the thing possessed, continuously and exclusively. Therefore there can be no such thing as constructive occupancy. But when one has the complete legal title to land, and is therefore entitled to the possession of the same in law, he is deemed to have it. (U. S. v. Arrendendo, 6 Pet., 743.) But prior to August 14, 1848, there could be no such possession of lands in Oregon, because the legal title was in the United States. Occupancy or actual possession was the only interest any one then had in lands in Oregon, and when that was given up or abandoned the relation of the party to the land was absolutely terminated, and it was open to occupation by the next comer as though the foot of man had never been upon it. (Lownsdale v. City of Portland, 1 Deady, 1.)

Prior to August 14, 1848, the only interest which the defendant had in the premises was that of occupancy or actual possession. It therefore could have no constructive possession of the land. If this actual possession or occupancy existed at the passage of the act making the grant, the title of the United States was then and thereby and on that account vested in the defendant, but not otherwise. The act makes the grant to take effect, not upon an occupation which preceded or followed it, but upon that which was contemporaneous with it. The grant was made upon the condition precedent that the defendant was then in occupation of the premises. Intention or desire to occupy is of no avail; and for the want of this occupa-

tion there is no excuse or equivalent. Even taking the view of the matter sought to be maintained by the defendant, that it was prevented from occupying the premises on August 14, 1848, by Indian hostilities, still the case clearly falls within the ruling in Ford v. Kennedy, 1 Or., 166, in which it was held that the grant in § 4 of the donation act of 640 acres of land to married persons who had resided upon the same for 4 years prior thereto, or to their heirs in case of their death before the patent issued, did not include the heirs of married persons who had died before the passage of the act, because, by the terms thereof, the grant was limited to persons residing in the Territory at the time of its passage—then in being. So in this case the grant only applies to stations then occupied for missionary purposes, and if for any reason a station was not then so occupied it is not within the purview of the act—it matters not how long or how effectively missionary operations had been carried on there at some former period. The station at Wailatpu would in all probability have been occupied by the Presbyterian Society on August 14, 1848, but for the massacre of the missionaries there on November 29, 1847. But this fact did not excuse or was not equivalent to such occupation. Therefore, in the passage of the act to organize Washington Territory, passed March 2, 1853, when Congress had this subject before them with reference to the missionary stations in the proposed Territory, the grant was repeated in the terms of the Oregon act, with the addition of the words, "or that may have been so occupied as missionary stations prior to the passage of the act establishing the territorial government of Oregon." This change was manifestly made to meet the case of the Wailatpu mission, which was not occupied as a mission station on August 14, 1848, and upon the theory that for want of such occupancy it was not granted by the Oregon act to the society which Dr. Whitman represented during his residence upon it, prior and up to the time of his death. But such want of occupancy being neither the result of a voluntary abandonment or a fleeing like the hireling from the wolf, but of the death of the faithful occupant at his post by Indian treachery and violence, Congress was induced to extend the terms of the grant so as to include that case.

But as has been shown, there is not the slightest ground for saying that The Dalles station was abandoned by the defendant's missionaries on account of fear of the Indians or that such cause prevented its occupation by them in August, 1848. On the contrary they deliberately abandoned it without any intention of returning, because of a change of policy on the part of the society, and if the act of 1848 had not contained the clause making grants of mission stations as it did, it is morally certain that we would never have heard of this manifest afterthought, that Whitman was to keep up the missionary work at The Dalles, in some sense as the representative of and for the defendants, and that upon his death the station would have been reoccupied and held by it as a mission but for fear of the Indians.

But it is urged that Congress has recognized the validity of the defendant's claim to this land by the passage of the act of June 16, 1860 (12 Stat., 44), "for the relief of the missionary society of the Methodist Episcopal Church," which provided that there should be paid to said society "the sum of $20,000, upon filing in the proper department a release to the United States, to be approved by the Attorney-General, of all claim to the land embraced within the limits of the military reservation at The Dalles

in Oregon Territory, and of all claim for damages for destruction of property on or near the said land by the United States troops or volunteers or Indians at any time anterior to the date of said release."

To fully comprehend the motive and scope of this act, it is necessary to state that in 1854 the military reservation at The Dalles which had covered a number of square miles, was, by an order from the War Department, reduced to 640 acres, to be laid off in such a manner as least to interfere with private rights. In the execution of this order only 353 acres of the mission station, as surveyed in 1850 by the defendant, including all the improvements thereon, were embraced in the reservation. The society at once asked for compensation. The matter was referred by the department to Maj. G. J. Raines, then the post commander at The Dalles, who reported in favor of paying the society the sum of $20,000. On January 28, 1859, the House Committee on Military Affairs also recommended such payment, which was to be in full satisfaction of the claim for the land and also one for $4,000 for the destruction of property upon the claim. The committee state in their report that it appears from the evidence that the society was in the "possession" of the land on August 14, 1848, and that as soon as the danger from Indian hostilities admitted, it endeavored to "reoccupy" the premises, but the United States "troops had ere then taken possession," and included them in the military reservation.

92 The committee seem to have avoided saying that the society was in the occupation of the premises on August 14, 1848, but chose the more indefinite and convenient term "possession." In passing the bill, however, Congress made no declaration on the subject.

This is one of the matters alleged in the answer, which was excepted to as impertinent.

So far as these suits are concerned, it only amounts to this: Upon the ex-parte representations of the defendant, Congress was induced to pay $20,000 in satisfaction of its claim for one-half of the premises, and the value of the improvements thereon, whether destroyed by the volunteers under the provisional government, the Indians, or the United States troops, and estimated by it at $4,000.

As has been stated, no reasons were given by Congress for the passage of the act, but in fact various ones may have, and probably did influence the action of members in favor of the appropriation.

Probably the strongest consideration in its favor was the fact, that although the defendant might not have been in the occupation of the station in August, 1848, still it had maintained a mission there for 9 years prior to September, 1847, during a portion of which time the title to the country was in dispute, and therefore there was a strong equity in favor of its receiving some compensation, in either land or money. Again, the very fact that the defendant is the representative of a popular and powerful religious organization, for whose good will and favor the average Congressman in Oregon and elsewhere has a lively regard, may not have been without its effect on the result.

But be this as it may, the action of Congress in making provision for the payment of this claim cannot, under the circumstances, have the effect to invest the defendant with the title to the premises. In legal effect, all that was done amounted only to a release by the defendant of its right, if any, to the one-half of the claim occupied by the military, and for damages

for the loss or destruction of property, which is not even an admission by the United States, to whom the release was made, that the releasor, the defendant, ever had any right to either, but only that it asserted some kind of claim thereto which it was deemed expedient to satisfy and extinguish. (Bright v. Rochester, 7 Whea., 548; Watkins v. Holman, 15 Pet., 53; Croxall v. Shered, 5 Wal., 287; Merryman v. Bourne, 9 Wal., 600.)

Besides this, one of the plaintiffs and Bigelow, under whom the others claim, had already acquired rights in the premises under the town site and donation acts, which Congress could not deprive them of, even if they had been parties to this proceeding, which resulted in the payment to the defendant. Congress has the power to dispose of the public lands and to make compensation for private property taken for public uses, but it has not judicial power, and therefore cannot finally determine conflicting claims to land, although arising under its own grants or laws.

But since this payment to the defendant of $20,000, there is no longer any cause for regarding it as even morally entitled to anything from the public on account of its missionary operations at The Dalles. In 1847, when the place was abandoned by the defendant, it had no market value, because, there being no white people east of the Cascade Mountains, except the Presbyterian and Roman Catholic missionaries, there were no other purchasers for it; and rather than let it fall into the hands of the latter, it was disposed of to Dr. Whitman for $600. And it appears that he was induced to make the purchase, even at that figure, as much to prevent the "priests" from getting hold of the position as anything else. In 1850, when the claim was taken by the military, it probably could not have been sold with good title for $1,000, and even as late as 1854, '5, when the town had commenced to grow, the sum paid the defendant by the United States for the one-half of it, was more than double the value of the whole of it.

The conclusion of the court is that the defendant did not occupy the premises on August 14, 1848, as a missionary station or otherwise, either by itself or the American board, and that it was not deterred from so doing by the danger from Indian hostilities, but voluntarily abandoned the same before September 10, 1847, without any intention or expectation of reoccupying it under any circumstances, and therefore the patent therefor to the defendant was wrongfully issued; and the decree of the court will be that the defendant be declared a trustee for the several plaintiffs herein, for so much of the premises described in the patent as is claimed by them in their several suits, and that the defendant, within 90 days, by a sufficient conveyance or conveyances, containing proper covenants against its own acts, to be approved by the master of this court, release to the said plaintiffs accordingly all right and title to the said premises, and that it pay the plaintiffs their costs and expenses of suit.

MATTHEW P. DEADY,
*U. S. District Judge Oregon.*

JAMES K. KELLY and A. N. GATES,
*For Plaintiffs.*

RUFUS MALLORY and JOHN C. CARTWRIGHT,
*For the Defendant.*

(Endorsed:) Filed December 3, 1879. R. H. Lamson, clerk.

92½ And afterwards, to wit, on the 13th day of February, 1880, there was duly filed in said court a stipulation, in words and figures as follows, to wit:

93 *Stipulation.*

In the circuit court of the United States for the district of Oregon.

It is hereby agreed that the bond for costs on the appeal to the Supreme Court of the United States in the following cases, to wit, Dalles City v. The Missionary Society of the Methodist Episcopal Church, def't, and Kelly, Wait, and Humason against The Same, and Kelly and Wait v. The Same, shall be $600, with such sureties as the statutes provide.

Portland, Oregon, Feb. 7, 1880.

JAMES K. KELLY,
*Att'y for Defendant.*
J. C. CARTWRIGHT,
*Att'y for Appellants, The Missionary Society of the M. E. Church.*

(Endorsed:) Filed February 13, 1880. R. H. Lamson, clerk.

93½ And afterwards, to wit, on the 13th day of February, 1880, there was duly filed in said court a bond, in words and figures as follows, to wit:

94 *Bond.*

Know all men by these presents that we, E. J. Northrup and D. P. Thompson, are held and firmly bound unto James K. Kelly, Aaron E. Waite, and Phebe M. Humason in the full and just sum of six hundred ($600) dollars, to be paid to the said James K. Kelly, Aaron E. Waite, and Phebe M. Humason, their heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated the 13th day of February, A. D. 1880.

Whereas lately, at a term of the circuit court of the United States for the district of Oregon, held at Portland, in the State of Oregon, in a suit depending in said court between James K. Kelly, Aaron E. Waite, and Phebe M. Humason, complainants, and The Missionary Society of the Methodist Episcopal Church, defendant, a final decree was rendered against said defendant, and said defendant is desirous of removing said cause by appeal to the Supreme Court of the United States to reverse the said final decree of said circuit court in the aforesaid suit, and a
95 citation directed to said complainants, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next:

Now the condition of the above obligation is such that if the said appellant shall prosecute its said appeal to effect, and answer all costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

E. J. NORTHRUP. [SEAL.]
D. P. THOMPSON. [SEAL.]

Sealed and delivered in presence of—

DISTRICT OF OREGON, *ss:*

E. J. Northrup and D. P. Thompson, each being duly sworn for myself, say I am a resident of and householder in the State of Oregon; that I am worth the sum of twelve hundred dollars over and above all debts and liabilities and property exempt from execution.

E. J. NORTHRUP.
D. P. THOMPSON.

Subscribed and sworn to before me this February 13, 1880.

P. H. LAMSON,
*Clerk U. S. Circuit Court, Oregon.*

Approved, DEADY, *J.*

(Endorsed:) Filed February 13, 1880. R. H. Lamson, clerk.

95½ And afterwards, to wit, on the 16th day of February, 1880, there was issued out of said court a citation, in words and figures as follows, to wit:

96 *Citation.*

The United States of America to James K. Kelly, Aaron E. Waite, and Phœbe M. Humason, greeting:

Whereas the Missionary Society of the Methodist Episcopal Church has lately appealed from a final decree lately rendered in the circuit court of the United States for the district of Oregon, in your favor, and against the said Missionary Society of the Methodist Episcopal Church, to a Supreme Court of the United States, to be holden at Washington, on the second Monday in October next, and has given the security required by law: Now, therefore, you are hereby cited and admonished to be and appear at said Supreme Court of the United States on the said second Monday in October next, to show cause, if any there be, why said final decree rendered in your favor, and against the said Missionary Society of the Methodist Episcopal Church, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

MATTHEW P. DEADY,
*U. S. District Judge, Oregon.*

96½ I hereby acknowledge service of the within citation this day, the 16' Feb., 1880.

Portland, O'g'n.

JAMES K. KELLY,
*One of Plaintiffs & Att'y for Copl'ff's.*

Filed February 16, 1880. R. H. Lamson, clerk.

96¾ *Complainants' testimony.*

97 *Deed.—W. D. Bigelow to O. Humason.—Filed for record Dec.* 12, 1864, *at 3 o'clock p. m.*

[U. S. R. stamp, $2.00. Cancelled.]

This indenture witnesseth that I, W. D. Bigelow, in consideration of

the sum of one thousand dollars, to me paid by O. Humason, the receipt whereof is hereby acknowledged, do hereby sell, convey, remise, release, and forever quit-claim unto the said O. Humason, his heirs and assigns, all that lot or parcel of land situate in Dalles City, Oregon, and bounded and described as follows, to wit:

In Bigelow's Bluff addition to Dallas City: Lots 3, 4, 5, 6, 9, 10, 11, & 12, in block 12; lots 4, 5, 8, 9, in block 25; lots 1, 2, 4, 5, 7, 8, 10, & 11, in block No. 31; lots 2, 3, 5, 6, 8, 9, 11, & 12, in block 30; lots 1, 2, 5, & 6, in block one; lots 6, 7, 8, 9, 10, in block 2; lots 2, 3, 12, & 13, in block 3; lots 1, 3, 8, 14, & 16, in block 8; lots 3, 4, 7, 8, & 10, in block 7; lots 1, 7, 8, 10, & 11, in block 6; lot 7, 9, 10, in block 5; also the undivided two-thirds interest in blocks 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, & 70, in said addition; and the undivided two-thirds interest in Bigelow's donation land claim, situated in Wasco County, Oregon, being the remaining portion of said claim of 320 acres, except the portion included in
98 said town lot, with all the buildings, improvements, privileges, and appurtenances thereunto belonging and appertaining, to have and to hold the above-released premises, with their appurtenances, to the said O. Humason, his heirs and assigns, forever. And I, the said W. D. Bigelow, do covenant to and with the said O. Humason, his heirs and assigns, that the said above described premises are free from all incumbrances made or suffered by the said W. D. Bigelow, and that I will warrant and defend the same to the said heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under me, the said W. D. Bigelow, but against none other.

Witness our hands and seals this 12th day of December, 1864.

W. G. BIGELOW. [SEAL.]

Signed, sealed, and delivered in presence of—
O. S. SAVAGE.
JAS. A. ODELL.

STATE OF OREGON,
*County of Wasco, ss:*

Be it remembered that on the 12th day of December, A. D. 1864, before the undersigned, a notary public, duly qualified, came the above-named W. D. Bigelow, who is to me known to be the identical person described in and who executed the foregoing conveyance, and ac-
99 knowledged that he had executed the same.

Witness my hand and notarial seal.

[SEAL.] JAMES A. ODELL,
*Notary Public, Oregon.*

STATE OF OREGON,
*County of Wasco, ss:*

I, R. F. Gibons, county clerk in and for said Wasco County, and ex officio clerk of the circuit court of the State of Oregon for the county of Wasco, do hereby certify that I have compared the foregoing with the original entry in vol. C, page 534, of record of deeds of said Wasco County, and that it is a true and correct transcript therefrom, and of the whole of said original, as the same appears of record at my office and in my custody.

{ CIRCUIT COURT WASCO COUNTY, STATE OF OREGON. } In witness whereof I have hereunto set my hand and affixed the seal of said circuit court this 5th day of June, A. D. 1859.

R. F. GIBONS, *Clerk.*

100 OREGON.

*Notification to the surveyor-general of Oregon of settlement on public lands not yet surveyed.*

Pursuant to the act of Congress approved on the 14th day of February, 1853, entitled "An act to amend an act entitled 'An act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey and make donations to settlers of the said public lands,'" I, Windsor D. Biglow, of Clackamas County, in the Territory of Oregon, hereby give notice of my claim to a donation of 320 acres of land, particularly bounded and described as follows: Beginning at a point in the south bank of the Columbia River at a point where William C. Laughlin's west line intersects the Columbia River, running

thence S. 32° 30′ W., 105.00 ch's,

| | | |
|---|---|---|
| east, | 72.00 | " |
| north, | 52.00 | " |
| west, | 15.00 | " |
| north, | 36.50 | " to the place of beginning, containing |

320 acres, as appears by the annexed diagram.

Oregon City, 22d November, 1853.

W. D. BIGLOW.

(Written on margin in original:) The surveyor-general advises settlers to survey their claims, establish their corners, and plainly mark their lines, to secure the full quantity of land allowed by law, and prevent a conflict of boundaries; also to transmit their surveys and plats with their notifications.

101 *Affidavit of settlers on unsurveyed lands claiming under the 4th section of act of 27th September, 1850.*

Windsor D. Biglow, of Clackamas County, in the Territory of Oregon, being first duly sworn, says that he is a white settler on the public lands in Oregon, and that he arrived in Oregon on the day of October, 1849, and was a resident thereof on and before the first day of December, 1850; that he is a native-born citizen of the United States, and that he was born in County, Massachusetts, in the year 1823; that he has personally resided upon and cultivated that part of the public lands in Oregon particularly described in the annexed notification to the surveyor-general of Oregon, continuously, from the 2d day of November, 1853, to the 22d day of November, 1853; and he further says that he is not a married man.

W. D. BIGLOW.

Subscribed and sworn to before me this 22d day of November, 1853, in Oregon City.

C. R. GARDNER,
*Sur. Gen. of Oregon.*

U. S. LAND OFFICE,
*Oregon City, Oregon, June 16th,* 1879.

I, L. T. Barin, of the land office at Oregon City, Oregon, do hereby certify that the within copies of the original notification of Windsor D. Biglow has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original notification of said Windsor D. Biglow, now on file at this office.

L. T. BARIN, *Register.*

102 *Will of Orlando Humason.—Filed for record Sept. 13th,* 1875.

Know all men by these presents that I, Orlando Humason, of Dalles City, Wasco County, State of Oregon, being of sound mind and memory, do make and publish this my last will and testament in the manner and form following:

First. I hereby direct my executrix hereinafter mentioned, after paying all my just debts and funeral expenses, to forward the sum of three hundred dollars to Charles Humason.

Second. I give, devise, and bequeath all my real and personal property of every kind and nature to my wife, Phœbe M. Humason, so long as she shall remain unmarried and my widow, and that the provisions of this bequest are intended to be in lieu of all right of dower on the part of my said wife; and if she accepts the same, she is requested to file a written acceptance of the provisions of this will, waiving all right of dower; and at my said wife's death, or in case my said wife should marry, then I hereby direct that all my property, both real and personal, be equally divided between all my children born, and that may hereafter be born, of myself and my said wife, Phœbe M. Humason, or their heirs, share and share alike.

Third. I will and ordain that the provisions of this my last will and testament shall not apply to any money realized upon my life in-
103 surance company policies nor to any property held by my said wife in her own right.

Fourth. I will and ordain that my executrix of this my last will and testament for and towards the performance of said testament may after my decease bargain, sell, and alien in fee-simple all my lands or otherwise, for the doing, executing, and perfect finishing whereof I do by these presents give to my executrix full power and authority to grant, alien, bargain sell, convey, and assure in her own proper name all the same lands to any person or persons and their heirs forever, by all and every lawful means in the law as to my said executrix shall seem fit or necessary, and at such price as she may think best.

Fifth. I hereby nominate and appoint my said wife, Phœbe M. Humason, sole executrix of this my last will and testament, and I direct and authorize that she act as such without giving any bond or undertaking.

In witness whereof I, Orlando Humason, have to this my last will and testament subscribed my name and affixed my seal this 30th day of August, A. D. 1875.

ORLANDO HUMASON. [SEAL.]

On this 30*d* day of August, A. D. 1875, the said Orlando Humason signed the foregoing instrument in our presence, declaring it to be his last will and testament, and as witnesses hereof we have in his presence
104 and in the presence of each other hereto subscribed our names.

R. F. GIBONS. Residence at Dalles City, Oregon.

J. W. FRENCH. Residence at Dalles City, Oregon.

STATE OF OREGON,
*County of Wasco, ss:*

I, R. F. Gibons, county clerk in and for said Wasco County, and ex-officio clerk of the circuit court of the State of Oregon, for the county of Wasco, do hereby certify that I have compared the foregoing with the original entry in the record of wills of said Wasco County on pages 44, '5, & '6, and that it is a true and correct transcript therefrom and of the whole of said original as the same appears of record at my office and in my custody.

{ CIRCUIT COURT, WASCO COUNTY, STATE OF OREGON. } In witness whereof I have hereunto set my hand and affixed the seal of said circuit court this 4th day of June, A. D. 1879.

R. F. GIBONS, *Clerk.*

105 No. 8020.—*Notification of the register and receiver of the land office for Oregon on the settlement of public land in township one north, range* 13 *east.*

Pursuant to the act of Congress approved on the 27th day of September, 1850, entitled "An act to create the office of surveyor-general of the the puble lands in Oregon, and to provide for the survey and make donations to settlers of the public lands," and amendments thereto:

I, Windsor D. Biglow, in the State of Oregon, hereby give notice of my claim to donation of three hundred & twenty acres of land, known and designated in the surveys and plats of the United States as the beginning at the NW. corner of the claim in section 3, 48.92 chains west and

4.83 chains south of the corner to fractional sections 2 & 3. Thence south 36.50 chains.
east 16.25 " Thence
south 49.47 " "
west 71.02 " "
N. 32° 30′ E. 101.82 chains to the place of beginning.

W. D. BIGLOW.

Witness:
W. W. CHAPMAN, *Sur. Gen.*

Part of secs. 3, 4, 9, & 10.

106 Windsor D. Biglow, of Wasco County, in the State of Oregon, being first duly sworn, says that he is a white male settler on public lands in Oregon; that he arrived in said State on the first day of October, 1849; that he was a resident thereof between the 27th day of September and the first day of December, 1850, and above the age of 21 years on the first day of December, 1855; and that he was born in Massachusetts in the year 1823; that he has personally resided upon and cultivated that part of the public land in Oregon particularly described in notification No. , hereto annexed, continuously from the first day of November, 1853, to the 16th day of February, 1860.

W. D. BIGLOW.

Subscribed and sworn before me this 16th day of February, 1860.
W. W. CHAPMAN,
*Sur. Gen. O'g'n.*

We, the undersigned, do hereby certify that the above & the foregoing are true copies of the original papers filed in this office.
United States land office, Dallas, June 29, 1877.
S. COFFIN, *Register.*
CALEB N. THORNBURY, *Receiver.*

107 No. 8020.—*Form of settler's oath.—Claiming by virtue of settlement and cultivation commenced subsequent to December* 1, 1850.

I, Windsor D. Biglow, and a claimant of the public lands described in the annexed notification of the register and receiver of the land office for Oregon, number 8020, under the provisions of the act of Congress approved the 27th day of September, 1850, entitled "An act to create the office of surveyer-general of the public lands in Oregon and to make donations to settlers of the said public lands," and I do solemnly swear that I am not acting, directly or indirectly, as an agent for or in the employment of others in making such claims, but that the land so claimed by me is for my own use and cultivation, and that prior to the expiration of four years' residence and cultivation I have made no sale or transfer, or any assignment or agreement for any sale, transfer, or alienation of the same, or by which the said land shall inure to the benefit of any other person.

W. D. BIGLOW.

Subscribed and sworn before me this 16th day of February, 1860.
W. W. CHAPMAN,
*Sur. Gen. Or'g'n.*

DALLES CITY.

108 No. 8020.

William C. Laughlin, of Wasco County, in the State of Oregon, being first duly sworn, says that he is in no way interested in the tract or tracts of land claimed as a donation by Winsdsor D. Biglow, and particularly described in notification No. 8020, hereunto annexed; that he is personally acquainted with said Windsor D. Biglow, and knows that he has personally resided upon and cultivated said tract or tracts of land, continuously, from first day of November, 1853, to the sixteenth day of February, 1860.

WM. C. LAUGHLIN.

Subscribed and sworn before me this 16th day of February, 1860.

W. W. CHAPMAN,
*Sur. Gen. Org'n.*

DALLES CITY.

No. 8020.

John Irvine, of Wasco County, in the State of Oregon, being first duly sworn, says that he is in no way interested in the tract or tracts of land claimed as a donation by Windsor D. Biglow, and particularly described in notification No. 8020, hereunto annexed; that he is personally acquainted with said Windsor D. Biglow, and knows that he has personally resided upon and cultivated said tract or tracts of land, continuously, from the first day of November, 1853, to the 16th day of February, 1860.

JOHN IRVINE.

109 Subscribed and sworn before me this 16th day of February, 1860.

W. W. CHAPMAN.

We hereby certify that the above and foregoing is a true copy of the original papers filed in this office.

U. S. Land Office, Dalles, Oregon, June 29, 1877.

CALEB N. THORNBURY, *Receiver.*
S. COFFIN, *Register.*

(Endorsed:) Notification No. 8020, W. D. Bigelow.

110 In the circuit court of the United States for the district of Oregon.

DISTRICT OF OREGON, *ss:*

I, R. H. Lamson, clerk U. S. circuit court for Oregon, do hereby certify that the foregoing transcript of the papers, pleadings, and orders of court, including the testimony and the opinion of the court, in the cause of James K. Kelley, Aaron E. Wait, and Phoebe M. Humason, vs. The Missionary Society of the Methodist Episcopal Church, has been by me compared with the originals thereof, constituting the record in said cause; and that it is a correct transcript of the whole thereof, as the same appears of record, and on file at my office, and in my custody; and I further cer-

tify that the copy of stipulation and bond on appeal, thereto attached, is a true copy of the original stipulation and bond on file in my office; and I further certify that the citation thereto attached is the original citation issued in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this February 19, 1880.

[SEAL.] R. H. LAMSON, *Clerk.*

(Indorsement on cover:) No. 207. The Missionary Society of the Methodist Espiscopal Church, appellant, vs. James K. Kelly, Aaron E. Wait, & Phœbe M. Humason. Oregon C. C. U. S. Filed 6th April, 1880.